UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

CASTLEWOOD COUNTRY CLUB

and **Cases 32–CA–24980**
32–CA–25397
UNITE-HERE LOCAL 2850, **32–CA–25545**
AFL-CIO

Table of Contents

STATEMENT OF THE CASE 1
FINDINGS OF FACT 2
I. Jurisdiction and Labor Organization Status 2
II. Complaint Allegations 3
A. The complaint in Case 32-CA-24980 3
1. Alleged violations of Section 8(a)(1) of the Act 3
2. Alleged violations of Section 8(a)(5) of the Act 3
B. The Consolidated Complaint Complaint in Cases 32-CA-25397 and 32-CA-25545 4
1. Alleged violations of Section 8(a)(1) of the Act 4
2. Alleged violations of Section 8(a)(3) of the Act 4
3. Alleged violations of Section 8(a)(5) of the Act 4
III. The Alleged Unfair Labor Practices 5
A. Background 5
B. The Parties' Bargaining for a New Contract 5
1. The parties' collective bargaining relationship 5
2. The Charging Party's motion for reconsideration of rejection of Charging Party proffered exhibits 6
3. Initial bargaining to August 10 8
4. Bargaining on August 10 15
a. The disputed bargaining of August 10, the evidence, and a threshold disquisition 15
(1) Collective bargaining generally, bargaining notes, and witness testimony respecting bargaining 16
(2) Respondent's counsel, Hulteng, and his bargaining notes for August 10 18
(3) The Parties' arguments addressed to the Respondent's counsel Hulteng's August 10 bargaining notes and his testimony respecting the August 10 bargaining session 19
(4) Findings and conclusions respecting Hulteng's bargaining notes, and testimony respecting bargaining on August 10 21
b. Findings concerning the collective-bargaining session on August 10 22
5. Bargaining after August 10 28
C. Other Matters 32
1. Subcontracting matters 32
2. Rule violation complaint allegations 34
3. The Club manager, Thomas Hunt 35
4. The Club's director of golf, John Hughes 36

D. Analysis and Conclusions 38
1. Subcontracting 39
2. Rule allegations 40
a. The no-access rule 40
b. The no-distribution rule 42
c. The early January 2010 timeclock posted memorandum to employees 43
3. The Thomas Hunt allegation 44
4. The John Hughes allegation 45
5. The Jerry Olson allegation 46
6. Bad-faith bargaining allegations 48
a. A basic overview of the events and issues 48
b. The Context of Respondent's bargaining in the Session on August 10 49
c. The bargaining session on August 10 new or amended Club proposals 50
(1) Union Shop: retitled, "Maintenance of Membership and Hiring" 50
(2) Seniority 51
(3) Subcontracting 51
d. The basic law of bad-faith bargaining and the arguments of the Parties 52
(1) Seniority and the locked-out employees' return at the lockout's end 54
(2) Union security 58
(3) Subcontracting 59
(4) Scheduling bargaining sessions 60
e. Consideration of the totality of circumstances 62
7. The status of the lockout on and after August 10 64
8. The Charging Party's motion for certain litigation costs 64
9. The Charging Party's motion for referral 68
Conclusions of Law 70
REMEDY 72
ORDER 75
APPENDIX 79

JD(SF)-36-12
Pleasanton, CA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

CASTLEWOOD COUNTRY CLUB

and **Cases 32–CA–24980**
32–CA–25397
UNITE-HERE LOCAL 2850, AFL-CIO **32–CA–25545**

Mathew C. Peterson, Esq. and *Carmen León, Esq.,*
for the Acting General Counsel.
Robert G. Hulteng, Esq., Galen M. Lichenstein, Esq.
and *Jessica L. Marinelli*, *Esq*.
(Littler Mendelson, P.C.) for the Respondent.
Kristin L. Martin Esq. and *Elizabeth Q. Hinckle, Esq*.,
*(*Davis, Cowell & Bowe, LLP) for the Charging Party.

DECISION

STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge. I heard this consolidated case in Oakland, California, over 9 days in the winter of 2011. The consolidated case arose as follows. Unite Here Local 2850, AFL–CIO[1] (the Charging Party or the Union) filed the charge in Case 32–CA–24980 against Castlewood Country Club (the Club or the Respondent) on March 2, 2010, and amended that charge on August 27, 2010. The Regional Director for Region 32 of the National Labor Relations Board (the Board) issued a complaint respecting that charge on August 30, 2010, and an amendment to that complaint on October 14, 2011. The Union filed the charge in Case 32–CA–25397 against the Respondent on October 18, 2010,[2] and on January 3, 2011, filed the charge in Case32–CA–25545 against the Respondent. On August 26, 2011, the Regional Director issued a consolidated complaint respecting these latter two cases against the Respondent. Thereafter, on October 12, 2011, the Regional Director consolidated all the outstanding complaints described above. The Respondent filed timely answers to the complaints and, following various postponements not here relevant, the case came on for hearing. Posthearing briefs were submitted by counsel for all parties in April 2012.

---

[1] The Charging Party's name, with the agreement of all parties, has been standardized throughout the instant decision as noted.

[2] All dates are in 2010 unless otherwise indicated.

As will be set forth with greater particularity below, the Club and the Union have been engaged in collective bargaining for a new contract to replace the contract that expired in 2009. The consolidated complaints allege and the answers deny, with certain additional associated allegations discussed below, that the Club during those collective- bargaining negotiations engaged in bad-faith bargaining in violation of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act).

The complaint allegations alleging wrongdoing are described in detail below. The allegations are organized first by the complaint or complaints in which they are alleged and second by the section of the Act which the complaints accuse the Respondent of violating. As to each complaint allegation, the Respondent in its answers has denied that the conduct took place as alleged, denied that the conduct alleged sustains a finding of a violation of the Act, or both.

Upon the entire record herein, I make the following findings of fact.

FINDINGS OF FACT[3]

I. Jurisdiction and Labor Organization Status

The complaints allege, the answers admit, and I find, that at all times material, the Respondent, a California corporation, has been engaged in the operation of a country club, golf course, and related dining facilities in Pleasanton, California. In the course and conduct of that business operation the Club at all relevant times has annually enjoyed gross revenues in excess of $500,000 and has annually purchased and received at its location goods valued in excess of $5000 which originated outside the State of California. Based on these facts, I further find that the Respondent has at all times material been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The complaints allege, the answers admit, and I find, that at all times material, the Union is and has been a labor organization within the meaning of Section 2(5) of the Act.

The Club at all relevant times[4] has employed at its facility various classifications of employees including employees in the following bargaining unit (the unit):

> All full-time and regular part-time employees engaged in or in connection with the preparation, handling and serving of food and/or beverages, including all food and cocktail waiters and waitresses, banquet waiters and waitresses, banquet captains, bar persons (bartenders), service bartenders, busboys (bussers), dishwashers, all cooks including dinner cooks, sous chefs, cook(s)in charge, night cooks, griddle cooks, fry cooks, and cook's helpers, pantry employees, cashiers, housemen, all maintenance

---

[3] As a result of the pleadings and the stipulations of counsel at the trial, there were few disputes of fact regarding collateral matters. Where not otherwise noted, the findings herein are based on the pleadings, the stipulations of counsel, or unchallenged credible evidence.

[4] As will be discussed in detail below, unit employees were, and as of the conclusion of the hearing herein remained, locked-out by the Respondent; temporary employees were being utilized by the Respondent during the lockout.

(general repair) employees and housekeepers/housekeeping employees, employed by the Employer at its Pleasanton, California facility; *excluding* all managerial and administrative employees, salespersons, office clerical employees, grounds maintenance employees (including mechanics), mechanical engineers, utilities employees, pro-shop employees, including merchandisers, cart staff and mechanics, and other golf and tennis personnel, guards, and supervisors as defined in the Act.

The unit has been found appropriate for collective bargaining under Section 9(a) of the Act by the Board.[5] The complaint alleges, the answers admit, and I find, that the Union by virtue of Section 9(a) of the Act has been at all times material the exclusive representative of employees in the unit for the purpose of collective bargaining with a respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

II. Complaint Allegations

A. The complaint in Case 32-CA-24980

1. Alleged violations of Section 8(a)(1) of the Act[6]

At complaint subparagraph 6(a), the General Counsel alleges that Club General Manager Jerry Olson on or about December 7, 2009 at a bargaining session in the presence of employees told employees that they could quit their jobs if they did not like the Respondent's bargaining proposals.

At complaint subparagraph 6(b), the complaint alleges that since about October 1, 2009, the Club has maintained the following two rules at the Club. First, a rule prohibiting employees' "unauthorized presence at member functions and member areas" (the No-Access Rule). Second, a rule prohibiting employees from engaging in the "unauthorized distribution of literature . . . on Club premises during working time and in work or members areas" (the No-Distribution Rule).

At complaint subparagraph 6(c) the complaint alleges that in early January 2010, the Respondent published and distributed to employees a memorandum threatening employees with discipline for violating the "No-Access Rule and the No-Distribution Rule".

At complaint subparagraph 6(d) the complaint alleges that on or about February 20, 2010, the Respondent's manager, Thomas Hunt, at the Club, threatened an employee with discipline for distributing union literature in a non-working area of the Club during nonworking time.

2. Alleged violations of Section 8(a)(5) of the Act

At complaint subparagraphs 10(a) and (b), the complaint alleges that, in or around February 1, 2010, the Respondent subcontracted kitchen cleaning work, historically performed

---

[5] Decision and Certification of Representative, Case 32-RC-1590 (July 14, 2010).

[6] Violations of subsections of Sec. 8 of the Act, other than Sec. 8(a)(1), are without exception also violations of Sec. 8(a)(1) of the Act. Alleged violations of those other sections of Sec. 8 of the Act are not listed under the recitation of 8(a)(1) violation allegations in this portion of the decision.

by the Respondent's unit employees, which subcontracting relates to unit employees' wages, hours and other terms and conditions of employment, and is a mandatory subject of bargaining. At complaint subparagraph 10(c), the complaint alleges this subcontracting by the Respondent was done without prior notice to the Union and without affording the Union an opportunity to bargain with respect to the contracting and the effects of the contracting.

B. The Consolidated Complaint Complaint in Cases 32-CA-25397 and 32-CA-25545

1. Alleged violations of Section 8(a)(1) of the Act

The consolidated complaint at subparagraph 8(a) alleges that on a date in late June or early July 2010, the Respondent acting through Manager John Hughes at its Pleasanton, California facility, informed a unit employees that the locked out locked-out employees would never be allowed to return to work at the Club.

2. Alleged violations of Section 8(a)(3) of the Act

The consolidated complaint alleges at subparagraph 10(a) that the Respondent wrongfully converted the Respondent's February 25, 2010 lockout of unit employees into an unlawful lockout effective August 10, 2010.

The consolidated complaint alleges at subparagraph 10(b) that the Respondent engaged in the acts and conduct alleged in complaint subparagraph 10(a), immediately above, in order to deny the locked-out unit employees the right to return to their former position of employment because the locked-out unit employees joined and/or supported the Union, and to discourage employees from engaging in union activities.

3. Alleged violations of Section 8(a)(5) of the Act

The consolidated complaint at subparagraph 9(a) alleges that on or about August 10, 2010, the Respondent presented to the Union its "Revised Final Employer Proposals" which, inter alia, changed the seniority and union-security provisions which the parties had previously reached tentative agreement on.

The consolidated complaint at subparagraph 9(b) alleges that the new seniority proposal described in complaint subparagraph 9(a) above was designed to deny the Respondent's locked-out unit employees the right to return to their former positions of employment and therefore is a nonmandatory subject of bargaining.

The consolidated complaint at subparagraph 9(c) alleges that since on or about August 10, 2010, the Respondent has insisted that the Union agree to the new seniority proposal and the new union-security proposal described in complaint sub-paragraph 9(a) above as a condition of reaching any new collective-bargaining agreement.

The consolidated complaint at subparagraph 9(d) alleges that since August 10, 2010, the Respondent has delayed bargaining and refused to meet more frequently with the Union unless the Union agreed to the new seniority proposal and the new union-security proposal described in complaint paragraph 9(a) above.

The consolidated complaint at subparagraph 9(e) alleges that by the acts and conduct described above in complaint subparagraphs 9(a), (b), (c) and (d), the Respondent has prevented the Union from reaching agreement on a new collective-bargaining agreement.

III. The Alleged Unfair Labor Practices

A. Background

At relevant times the Club's general manager was Mr. Jerry Olson and its Golf Department manager was Mr. John Hughes. Each is an admitted supervisor. During collective-bargaining negotiations with the Union in and after 2009, the Club initially utilized the services of the law firm of Morrison & Forester LLP and its counsel, David J. Murphy, to represent it in bargaining through the spring of 2010 and, thereafter as will be discussed in detail below, in June of 2010 substituted the services of the law firm of Littler Mendelson P.C. and its counsel, Robert G. Hulteng, who utilized fellow firm counsel, Galen M. Lichtenstein, and Jessica L. Marinelli from time to time. The respective lead counsel during their period of representation and General Manager Olson were the Club's negotiators during the bargaining with counsel Hulteng's fellow counsel occasionally in attendance. Messrs. Murphy and Hulteng took notes at the bargaining sessions.

During all relevant times the Union was represented in its dealings with the Club in bargaining by its president, Wei-Ling Huber, who participated in and led all bargaining sessions, Mr. Mike Casey, the president of Unite Here Local 2 in San Francisco, and Mr. Jeff Eatchel from the Union's International. Other union personnel and unit employees attended from time to time. Ms. Sarah Norr, the Union's representative, was the Union's note taker throughout the bargaining.[7] She took her notes of the bargaining on her computer laptop.

The events, statements, and circumstances during bargaining and at the bargaining sessions in particular were largely uncontested but important aspects were disputed and closely litigated as will be discussed below.

B. The Parties' Bargaining for a New Contract

1. The parties' collective bargaining relationship

The Club and the Union have had a collective-bargaining relationship for many years and have negotiated, signed, and applied at least several contracts in times past. The most recent collective-bargaining agreement was negotiated in 2006 and expired by its terms on September 1, 2009. Negotiations for a successor contract commenced in 2009 and are the focus of this inquiry.

The Union's president, Ms. Wei-Ling Huber, testified she has been a union official dealing with the bargaining unit for many years and participated in collective bargaining with the

[7] Ms. Norr's bargaining session notes, entered into evidence, are referred to herein simply as "the Union's notes."

Club for several predecessor contracts. She testified without contradiction that the relationship between the parties was historically amicable and there were few difficulties during the predecessor contracts' lives and negotiations for those earlier contracts went relatively smoothly with the bulk of the expiring contracts' terms being carried forward into the successor contract without modification. She asserted the previous contract entered into in 2006, which expired by its terms on September 1, 2009, was essentially such a carry-forward contract with its union security, seniority, and many other terms taken from the predecessor document.

The Club's general manager, Mr. Jerry Olson, was new to the Club in 2009 and had not been involved in previous bargaining. He testified however that as the new general manager, he was tasked by the Respondent with reviewing the terms of the previous contract with a view to improving the economic package from the employer's perspective given the Respondent's preliminary determination that represented employee costs under the expired contract were unnecessarily high and that the economic circumstances of the employer had been and were expected to continue to be adverse.

2. The Charging Party's motion for reconsideration of rejection of Charging Party proffered exhibits

During the hearing the Charging Party offered into evidence documents reflecting communications from club membership to club management offering support for the Club's bargaining with the Union as well as hostility and/or disapproval of the Union's positions at bargaining and its actions generally in support of its bargaining at various times during the negotiations. Some of these Charging Party exhibits were received without objection. Charging Party's Exhibits 4 and 8 were objected to by the Respondent and I sustained the objection as to each. The counsel for the Charging Party at trial and on brief renewed her request that I reconsider my rulings on these exhibits.

I reconsider my rejection of the Charging Party's exhibits noted, reverse my trial rulings, and receive the exhibits into the record. I do so for the following reasons. My original rejection of the exhibits was on relevance grounds. The Charging Party offered these exhibits as communications from the club membership to its managers as described above. The counsel for the Charging Party at hearing argued the communications were offered to provide evidence of the club members' exhortations to club management as relevant to the motives and actions generally of the Respondent during bargaining in making and describing its new seniority proposals as will be described below. The Respondent objected that such communications were irrelevant since no contention was being made that the club members were agents of the Club for purposes of this case, and the Respondent asserted it is the acts of the Club's board and its agents that are at issue herein.

I concluded at hearing that receipt of this collateral evidence simply took the litigants too far afield. I found the urgings of the club membership at best secondary evidence of the Respondent's bargainer's motives in taking the action they did in bargaining. In reviewing the entire record in light of the motion for reconsideration, I was able to consider subsequently developed evidence, namely evidence of bargaining table conversations which referred to club member communications to the Club's governing Board. I now recognize that the wishes of the membership that had been communicated to the Club management were alluded to by Respondent's counsel Hulteng, at the critical August 10 bargaining session as cause in part for

the new Club approach in bargaining. Given this is so, I find the documents are to a sufficient degree incorporated, by Hulteng's referential statements in bargaining, into the bargaining process to be included in the record. I therefore reverse my trial ruling rejecting this evidence and receive the earlier rejected exhibits into the record. As part of the record as a whole, I have considered them in reaching my decision herein.

Many of the statements made by club members to club leaders were based on the members' experiences after the lockout was underway and new temporary employees were working in the Club, a period extending from February to August, and were sent during that period. Several statements of club members were quoted by the Charging Party on brief at 19-20 [citations to the record omitted]:

> [Club M]embers responded that they did not want the locked-out employees to return to work for reasons unrelated to how the locked out employees did their jobs:
>
> —We would support not having union employees like all the other restaurants in town.
>
> —Please do lock them out permanently, if you can without causing legal liability to the club.
>
> —The new staff is doing very well. Maybe it is time to start anew and save the membership some money.
>
> —[T]he part time workers are getting better every day. We do not need the union. We are behind you.
>
> —I don't care how long the strike lasts. I do not wish for you to hire them back. Thanks for your commitment in this regard.
>
> —As far as I am concerned I would like to NOT see any of the picketing former employees returned to Castlewood. I would not trust any of them to serve my food or drink. The few who are not in this fight would be welcomed back.
>
> —Although some of the dining room workers are not as experienced and efficient as the old employees, they are very pleasant and hardworking helpers. Some of the temporary workers, on the other hand, are better than union employees and manage to keep the facility clean. Hire them to replace the union employees, if you can.
>
> —I am really hoping there is some way that Castlewood can rid themselves of the Union staff permanently! I certainly was never thrilled with their attitude before, and now they are just a huge turn-off (understatement of the century!) I would love to keep the new staff.
>
> —It has come to our attention that Castlewood is the only country club in northern California that employs union workers. This is unacceptable and a great detriment to further membership in our club . . . . It is my family's wish that Castlewood would cancel the union contract in favor of private employees.

—I support going non-union.

—I request that Castlewood does whatever it takes to remove the union from the club.

—Keep going don‘t stop now. We need the union to go.

—Don’t give in to this scummy union. My advice, like you need more, is to hire back the workers who want to return and replace the others.

—The best thing Castlewood can do is get rid of the union. I support the board in your efforts.

—Let‘s hang in there and if possible get rid of the Union.

—The union is the wrong labor force for us.

3. Initial bargaining to August 10

The parties met in their initial bargaining session on August 26, 2009. At that session, the Union presented an opening proposal, and the Respondent indicated that it had determined the expired contract was uncompetitive and overly generous. The Respondent argued that the Club was in straitened economic circumstances and needed to obtain economic concessions from the Union, particularly in health coverage and wages.

The Parties continued to meet and bargain through 2009 to December 7, 2009, reaching a variety of tentative agreements on language of various contract clauses. As 2009 bargaining continued, however, the parties made little headway on the critical issue of health coverage. It became increasingly clear through these 2009 negotiations that the parties were far apart on health coverage. The Respondent was seeking significant cost savings, changes in health coverage eligibility formulas, and fundamental changes in the type and nature of the health coverage to be offered under any new contract. The Union was generally happy with the expired contract’s healthcare coverage and was unwilling to acquiesce to the Respondent’s demands for very significant changes.

The Club came to believe that the Union, understanding that a new contract would inevitably have substantial and, from the Union’s perspective, adverse changes in healthcare coverage and cost, was deliberately dragging out contract negotiations to longer enjoy the likely superior terms of the current expired contact as compared to the terms of any new agreement.

At the December 7, 2009 bargaining session, union bargaining participant, unit bartender, Steve Freitas, raised his own proposed settlement involving his personal proposed compromises of the parties’ disagreements that he had earlier shared privately with the Respondent. The Union informed the Respondent at the bargaining session that the employee’s offer represented the views of Freitas and not the Union. Not successful in carrying the day, Freitas left the meeting in high dudgeon.

At this session there was colloquy respecting the proposed new contract’s handling of cooks classifications in the seniority language of the proposed contract, but the Respondent made

it clear that it believed the issue was minor and that bargaining was mired in minutiae that were not at the heart of the parties' contract differences and that healthcare was the major matter at issue, had priority, and needed to be addressed. Ms. Huber testified:

> And I said, well, there's still a lot of issues outstanding. And then Jerry [Olson] said that -- he said, "I don't know what the legal definition of impasse is, but I think, you know, we're there. And we're just wasting time over these issues, maybe it's time for employees to strike or quit."

The Union's bargaining notes have the following entry at this point in the bargaining session:

> Jerry [Olson]: no one disputes that. The issue is that we have incompatible philosophies on health care. We can't accept your proposal and you can't accept ours. I don't know what the definition of impasse is, but there's no point arguing about the same things. Maybe it's time for the employees to strike or quit.

Mr. Olson testified that his remarks at that time were in response to Huber's assertion that the Respondent was giving the employees no options. He testified he responded to Huber:

> Wei-Ling, that's not a true statement. They do have options. They can quit, go to other jobs. Or they can go on strike or they can accept our proposal, but there are options.

The Respondent on brief at 64 argued:

> [M]r. Olson reminded Ms. Huber that she said at a prior bargaining session that the employees had plenty of other, better options elsewhere. (Tr.1422:5-24 (Mr. Murphy)); 1704:11-15 (Mr. Olson).) He went on to say that, as Ms. Huber had previously stated, the employees actually *did* have options if they did not like the Employer's proposals – they could always quit and look for another job, or they could strike.

At the December 7, 2009 session, the Club told the Union it planned to submit a final offer in the near future. On December 23, 2009, the Club submitted a final proposal to the Union which by its terms noted, where applicable, those sections of its contract proposal which had been tentatively agreed upon (Marked "T/A" in the proposal.[8]) by the parties in bargaining to that point. The Respondent's email cover letter to the final offer to the Union stated in part:

> The Employer's final proposals are set forth in the accompanying draft of a new proposed collective bargaining agreement. While it reflects all of the terms of the parties have already tentatively agreed upon, it also contains the Employer's final concessions and

[8] The Club's proposal contained the following definition of "T/A":
("T/A" is marked herein to reflect tentative agreement based on the parties' mutual proposals, subject to each party's reservation of its right to change the terms of "package" proposals if the entirety of the package proposal is not accepted.)

proposals in response to the Union's last proposals delivered on December 7, 2009.[9] A redline version comparing this to the expired collective bargaining agreement also is attached so you can readily identify what has been revised.

Included in that written proposal were the following two "T/A" identified sections:

SECTION 2. *T/A* UNION SHOP AND HIRING:

(a) All employees covered by this Agreement shall, on the thirty-first (31st) day after their employment, or the date of this Agreement, whichever is the later, become members of the Union and retain such membership during the period of this Agreement as a condition of their employment.

(b) Upon written notification from the Union that an employee has failed to become or remain a member of the Union in good standing as provided herein, the Employer agrees to terminate said employee within seven (7) days from such notice.

(c) During the employment of any person while such person is not a member of the Union, the Employer shall pay said person so employed at the regular Union wage provided for in this Agreement for the class of work said person is doing, and shall in all other respects require said person to work under, and live up to, all Union rules and regulations covering said employment, as set forth in the Agreement.

(d) The standing of any employee as a Member of the Union shall be reflected by the Records of Local Union 2850.

(e) Whenever the Employer finds it necessary to hire new employees for vacancies in job classification, the Employer shall inform the Union via fax or e-mail if the Employer has publicly advertised for the position.

(f) Whenever the Employer hires an employee from any source he will at once inform the said employee of the terms and provisions of this Agreement and of the obligations of said employee hereunder and will also at once, in writing, notify the Union of such employment, giving the name, address and telephone number of the employee, as well as the date, the place of employment and the job classifications.

(g) The Employer may employ one (1) eight (8) hour or less per week cocktail server and one (1) eight (8) hour or less per week bartender for whom Union membership shall be voluntary.

9 As of the December 7, 2009 bargaining session the parties had exchanged and discussed proposals, but had not reached agreement on contract language respecting seniority. At this session the Union advanced its own proposal.

SECTION 6. *T/A* SENIORITY[10]:

(a) In the event the Employer finds it necessary to layoff employees or reduce hours due to slackness of business, such lay-offs shall be on the basis of seniority within classifications, *i.e.,* the Employee on duty in the establishment having the shorter period of continuous service with the Employer shall be laid off before any other employees having a longer period of continuous service. The Employer agrees to give preference to laid-off employees in re-employment by seniority within classification, provided the lay-off does not exceed twelve (12) months. Senior employees shall have preference of full-time employment, at all times. Reduction of shifts or hours of work shall be based on seniority within classifications. The Employer will distribute shifts to senior employees before distributing shifts to employees with less seniority, with the intention of providing as many hours of work as possible to senior employees. For the purpose of this section, classifications shall be those listed in the wage scale.
All other classifications shall be deleted:

SERVER (GRILL AND HACIENDA)
BUSSER (GRILL AND HACIENDA)
DISHWASHER
BANQUET SERVER
COOK
SNACK BAR
PANTRY COOK
COOK'S HELPER[11]
BARTENDER
HOUSEKEEPER
MAINTENANCE

(b) All shift vacancies and choice of days off shall be made available to senior employees if in the Employer's opinion, the senior employee is capable and qualified. However, for servers and bartenders, the Employer may designate up to two (2) shift/departments in the Grill, two (2) shift/departments in the Hacienda, one (l) shift in banquets and two (2) shifts in the kitchen (i.e. Saturday morning in the Grill) per week when they may assign Employees to work outside of seniority order. Employees may decline work in these management designated shift/departments if they have a provable prior commitment (i.e. a second job or a school pickup). An employee who regularly works the Grill or Hacienda shall only be able to exercise his or her seniority to work in the other department if he or she has lost shifts due to an Employer designation as described above or if he or she has lost 40% of their hours and shifts over a twoweek period.

The Club asked the Union to put its proposal to a vote of unit employees. The Union demurred and at all times thereafter declined to put any Respondent proposal to a unit ratification vote.[12]

---

[10] While there was agreement respecting the seniority language there was and continued thereafter to be disagreement respecting application of the language to the cook classifications.

[11] The Cook's helper classification was not in fact completely agreed upon in the relevant T/A.

[12] There is no dispute that under Board law the determination to submit an employer's contract proposal to a

Continued

The parties held their next bargaining session on February 3. On February 8, Murphy sent Huber a letter with the following text:

> This letter is to advise the Union that, effective with the beginning of the first working shift at Castlewood on February 16, 2010, Castlewood will lockout all bargaining unit employees from working at their jobs. Castlewood will cease the lockout, and all bargaining unit employees will be able to return to working at their jobs, if and when the employees accept the terms and conditions of Castlewood's "Final Employer Proposals" for a new collective-bargaining agreement and these terms are finalized into a new agreement between Castlewood and the Union. A copy of this letter will be provided to employees so that they are aware of its terms.
>
> For your Union and the employees' information, any replacement workers used by Castlewood during this lockout will be retained on only a temporary basis. The Castlewood bargaining unit employees will remain as permanent employees as that term is used under the National Labor Relations Act, but will be locked-out.
>
> Moreover, Castlewood wants to also make clear that it stands ready to continue bargaining with the Union for a new agreement. The parties' mutual agreement accomplishing this (ratified, if necessary to become a final agreement according to the Union's internal requirements, by the bargaining unit employees) would also have the effect of returning the employees to work and ending the lockout, as its focus no longer would exist.
>
> Please let us know if you have any questions.

The parties next met in bargaining on February 15. The day before—February 14—the Union had sent the Club a modified proposal which included a modification of section 6 removing the listed classification of cook's helper, but otherwise leaving the language as earlier tentatively agreed to. The bargaining at the session on February 15 did not address the section 6 difference in including the cook's helper classification, but rather focused on healthcare issues with Mike Casey, president of UNITE HERE Local 2, who was participating on behalf of the Union, emphasizing that the parties were not at loggerheads over healthcare, but rather had a difference over money that was "not that large" and could be resolved.

The Club indicated it was interested in resolving the healthcare coverage differences and would reconsider the lockout if an agreement could be reached on health insurance. The Union modified its position on eligibility hours needed to qualify for employee healthcare coverage and the Respondent announced it would provide a new healthcare proposal and for the time being call off the lockout. The next bargaining meeting was agreed upon for February 18.

In the early part of this February 15 session, the Respondent provided the Union a petition provided it earlier by Steve Freitas that apparently contained the signatures of a majority

---

ratification vote of unit employees is entirely the decision of the labor organization representing the employees and an employer has no right to insist on such a vote.

of unit employees urging an employee vote on the Club's proposal. The Union took the position that employee votes on contract proposals were the Union's decision to conduct or not and, further, told the Club that employees had earlier asked the Union and Freitas to take their names off the petition. During this exchange, Freitas and a few other employees left the session, which continued as described above.

At the February 18 session the Respondent represented it had not finished its new healthcare proposal but would provide it to the Union on Monday, February 22. The parties met again in bargaining on February 23. The Respondent had submitted a new contract offer which contained a modified health package and a wage incentive. The Union asserted that they viewed the economics of the health plan proposal favorably and they would make a counterproposal the following day, which the Respondent expressed interest in seeing. The following day the Union's offer was not submitted. The Union informed Respondent its offer would be delayed. The Respondent announced the lockout would begin the following day. The lockout commenced on February 25 and the Union submitted a new health package that, while addressing the economic arguments of the Respondent, did not accept the Respondent's proposed healthcare organizational and other changes.

On March 5 Mr. Steve Freitas filed a decertification petition with the Board docketed as Case 32-RD-1590 seeking to decertify the Union as the Club's unit employees' collective-bargaining representative. At the bargaining session on March 15, the parties agreed to defer further bargaining until the decertification petition had been processed.

The Board conducted a decertification election in Case 32-RD-1590 on April 2. The tally of ballots recites that 58 out of 61 eligible employees cast valid votes with the Union prevailing by a vote tally of 41 to 17. The Club thereafter filed objections to the election. A hearing was held before an administrative law judge on the objections on May 6. The objections were overruled by the administrative law judge on May 21, and the Board issued a Certification of Representative in the absence of exceptions on July 14, 2014.

On April 27, the Parties met again in bargaining. The Club submitted a document which proposed various changes to its last proposals including the following:

> CASTLEWOOD PROPOSAL AMENDING ITS FINAL EMPLOYER PROPOSALS
>
> Subject and expressly limited to the other terms and conditions of Castlewood's Final Employer Proposals, Castlewood hereby amends its Final Employer Proposals as follows:
>
> 1. Castlewood proposes a revised Section 2(a), 2(b) and 2(c) providing as follows: UNION SHOP AND HIRING:
>
> (a) All employees covered by this Agreement shall, on the thirty-first (31st) day after their employment, or the date of this Agreement, whichever is the later, become members of the Union and retain such membership during the period of this Agreement as a condition of their employment; provided, however, that for employees currently employed as of the date this Agreement becomes effective, the parties shall operate on an agency shop basis.

(b) Upon written notification from the Union that an employee has failed to become or remain a member of the Union in good standing as provided herein, the Employer agrees to terminate said employee within seven (7) days from such notice; provided, however, that this shall not apply to such employees who have timely elected not to remain members of the Union under section (a) and its agency shop approach.

c) During the employment of any person while such person is not a member of the Union, the Employer shall pay said person so employed at the regular Union wage provided for in this Agreement for the class of work said person is doing, and shall in all other respects require said person to work under, and live up to, all Union rules and regulations covering said employment, as set forth in the Agreement; provided, however, that this shall only apply to such employees who have timely elected not to remain members of the Union under section (a) consistent with principles of an agency shop approach.

Counsel Murphy for the Respondent testified that he told the Union the new union security language—he characterized it as a modified agency shop proposal—was designed to address the rift in represented unit employees that had been manifest in the Freitas contretemps:

> I emphasized again that there was obviously, now, something that had been different from any other collective bargaining I've ever been engaged in, that there was a huge rift in our own employee population; that I had never been involved in bargaining before with a situation where really, effectively, what was the chief employee spokesperson, Steve Freitas, had been thrown out of a bargaining session in front of our eyes; that we had gotten a petition from employees saying that they wanted to vote on ratification, but the Union refused to let them do it; that under those circumstances we felt that, as part of moving forward, in order to take care of that rift among employees and make this a workplace that minimized those rifts, that we at least wanted employees who were involved in that to have an option not to be required to maintain union membership because there obviously a lot of hostility towards them from the Union representatives themselves.

In late spring, with the lockout continuing, the Club undertook an internal review of its situation vis-à-vis the Union and negotiations and received and considered feedback from its membership on the relationship of the Club and the Union in the context of negotiations and the replacement of the locked-out unit employees by other employees. The Club determined to undertake a new course of action, replaced its labor counsel firm and lead negotiator Murphy with a new firm and counsel Hulteng as lead negotiator in mid-June. On July 14, the day the Board certified the Union as the unit employees' collective-bargaining representative, as described above, the Parties met for bargaining with counsel Hulteng attending for the first time and acting as the Club's chief negotiator.

With counsel Hulteng new to the bargaining, there was a general discussion of the bargaining up to that point and Hulteng made it clear that he was seeking the Union's views and that he would report to his client's management, reach joint conclusions and return to the next bargaining session with an informed plan and concrete proposals. Hulteng testified he made various statements during bargaining:

> I'm sort of coming in as an outsider here. I haven't been part of this up until now, but just sort of applying my experience to the situation. I was wondering how the Union would justify the obligation of employees to pay union dues when there appeared to be very deeply divided views amongst the employees. And, in addition, that there may or may not be new people in the mix at the end of the labor dispute. And I further said that another -- and I said I need to understand from you, how do I go back to the Board and tell them that there should be a required dues payment obligation under these unusual circumstances. But then I remember now specifically saying -- and there's another thing struck me here, again, coming in as an outsider, which is that I'd like to understand why the Union feels that they've got leverage at this point, in this labor dispute, overall. And I noted the fact that it had gone on for some time already. My understanding was, the Club had sort of weathered the storm, that they were doing fine. Indeed, it had been reported that service had actually improved during the course of the lockout over what it had been before, and that I just needed to get their understanding since it was my impression they had sort of done their worst already in terms of publicity, and demonstrations, and so forth; that what is the leverage at this point that they could explain to me that they've got.

The Union's notes for the session conclude:

> R[obert] H[ulteng]: we need to assess if we're past the point of no return.
> W[ei-Ling] H[Huber]: I'm not sure that there's - how would one mark the point of no return? There are benchmarks - board election, maybe we have an election in April. A year later it all happens again.
> RH: When I say point of no return, I mean can we bridge these gaps. Time and leadership changes can affect positions. If a deal's available, we should do it now or soon. If neither side can justify sufficient change in position to get a deal, that's what I meant' by point of no return. We'll have to decide if it makes sense to just keep flogging away. I don't know how our side will size all that up, but I should be able to speak to that at our next meeting. I need to meet with board and review issues raised, then we should come back. Talk: re dates in the next couple days.

4. Bargaining on August 10

a. The disputed bargaining of August 10, the evidence, and a threshold disquisition

The specifics of the August 10 bargaining session were disputed. Evidence offered in support of the events was of three types: documents used at the session, testimony of bargaining session participants, and the Union's and the Respondent's bargaining notes.

There was no controversy respecting the document entered into the record which was identified as the Respondent's proposal submitted that day. The bargaining notes of each side were put into evidence covering all the individual bargaining sessions including the August 10 session. The August 10 bargaining notes comprised the Respondent's counsel Hulteng's four pages of handwritten notes and the Union's Representative Norr's laptop entered notes printed out in "hard copy" i.e.. on paper.

Witnesses Huber, Norr, Olson, and Hulteng testified respecting the bargaining sessions, including the August 10 session. Norr and Hulteng also testified about their note-taking

generally, note-taking during the instant bargaining, and note-taking during the August 10 session. The record is clear that the witnesses utilized the notes to refresh their recollection of bargaining session events. Mr. Lloyd Cunningham, an expert forensic document examiner also testified respecting Hulteng's bargaining notes for the August 10 session.

(1) Collective bargaining generally, bargaining notes, and witness testimony respecting bargaining

The National Labor Relations Act from its inception has regulated collective bargaining, and the actual events of collective bargaining are frequently a subject of Board unfair labor practice proceedings. Parties' negotiations are not uncommonly examined in detail in such cases. While there are endless variations in bargaining practices and circumstances, it is common for collective bargaining between an employer and a labor organization to be comprised of numerous face-to-face meetings between multiple representatives of each side during which numerous contract elements are individually proposed, discussed, and either tentatively agreed to, rejected or addressed in a counteroffer. Bargaining may involve many sessions over a long period of time and cover multiple issues and substantial, complex and, often disputatious negotiations respecting terms of a contract.

Bargaining then often involves numerous sessions dealing at great length with matters of complexity and detail. The stakes in bargaining are regarded, and objectively often are, high and keeping careful track of proposals, counterproposals, disagreements and, agreements—indeed all aspects of the bargaining both during the process and, equally important, after the conclusion of bargaining—is universally recognized by bargainers as significant.

For both historical and other reasons not relevant here, collective-bargaining sessions are not typically mechanically recorded using audio or audiovisual recording equipment. Nor are they normally recorded or reported by a third party/neutral services such as a court reporting service. Rather, in my over 40 years' experience in the courtrooms of the Board, the individual sides typically take their own notes respecting what took place in bargaining and meld those notes with the various other evidence of proposals and other documents and correspondence exchanged to compile a durable record of bargaining.

During collective-bargaining negotiations, employers and labor organizations of above a minimum size frequently utilize the services of experts or experienced bargainers to lead their respective bargaining teams. This was true in the instant case. The Respondent utilized experienced labor counsel and the Union utilized a long-experienced union official. Such individuals often have very substantial experience in collective bargaining and may be involved in multiple sets of collective-bargaining negotiations at various periods of time.

Professional bargainers who are witnesses in NLRB unfair labor practice hearings may well be expected to testify to numerous bargaining sessions over a lengthy period of time, sometimes up to a year or more, during which period these individuals may have participated in other negotiations between other parties. In the instant case, the bargaining spanned over a score of sessions and the unfair labor practice witnesses to the bargaining on August 10 were testifying to events that were almost 2 years old at the time of their testimony.

In this context, it is perhaps self evident that bargaining witnesses very often refresh their recollection of given bargaining sessions by reading their bargaining notes prior to testifying. And, they often utilize those bargaining notes during their testimony for the same purpose. Further, the counsel or representative conducting direct examination and/or cross-examination of such witnesses dealing with bargaining often direct the witnesses to review bargaining notes to refresh recollection, to impeach testimony or to rehabilitate the testimony of given witnesses. Bargaining notes are thus a big deal in unfair labor practice hearings respecting bargaining.

The detail, accuracy, and understandability of notes of bargaining sessions vary with the experience, skills, and habits of note takers as well as the difficulty of the particular task given to individual note takers at individual sessions. Note takers may take such sketchy or abbreviated notes as to render the notes ineffective tools for determining what occurred in bargaining or for refreshing a bargaining participant's recollection of what took place at a particular session. Other note takers may be much more copious in note-taking and zealous to accurately record what occurred. Generally, the differences in the notes of honest note takers' notes are less in the occurrence of mistakes in what is recorded in the notes than in mistakes resulting from a failure to include, i.e., in things omitted from the notes. This is so because an honest note taker is less likely to err by misreporting specific positive elements of an event, statement, or exchange than to err rather by omitting parts of, or the entirety of, such an event, statement, or exchange due to distraction, fatigue or the speed or complexity of the occurrence of events being recorded.

In the individual bargaining sessions involved herein, the Union had a designated note taker, Norr, whose sole job at the bargaining table was to take notes on her laptop computer of what was said at each session. The Respondent utilized its labor counsel, initially Murphy and later Hulteng, to serve both as its note taker and as its principal spokesman in bargaining. Inevitably, Norr, who was a fast typist, put down a significantly greater percentage of the bargainers' remarks in her notes than Hulteng, who was both making handwritten entries and actively participating in the give and take of bargaining as the Respondent's spokesperson. And, while Norr was tasked with recording all the bargainers' remarks at the individual bargaining sessions, Hulteng testified that he was most concerned with recording in his notes such things as proposals, tentative agreements, offers, counteroffers, and material directly relevant to what the contract would say and or how it would be later interpreted rather than concerned with recording every element, statement, and aside of the bargaining process as it occurred. Norr's notes were undisputedly more complete and did not involve self-editing by the note taker based on such bargaining remarks' categories of importance.

Bargaining notes under the Federal Rules of Evidence (FRE), which rules apply to Board unfair labor practice proceedings insofar as practicable, are hearsay. Under FRE Section 801(c) hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted" and as such is inadmissible evidence. FRE Rule 803, Section 6 makes an exception to exclusion for hearsay evidence where the evidence on offer is a record of regularly conducted activity. Normally bargaining notes are regarded as such business records and may be received into the record as substantive evidence of what occurred at bargaining meetings. *Continental Can Co*., 291 NLRB 290, 294 (1988); *Pac. Coast Metal Trades Dist. Council*, 282 NLRB 239, 239 fn. 2 (1986); *Electrical Workers IBEW Local 211 (Atl. Div. NECA)*, 280 NLRB 85, 106 fn. 51 (1986), enfd. 821 F.2d 206 (3d Cir.

1987); *Mack Trucks, Inc.*, 277 NLRB 711, 725 (1985). As Administrative Law Judge Miller noted in *Mack Truck*,[13] while bargaining notes are to be received into evidence, the weight to be accorded to particular notes may often depend on an evaluation of the note taker and the relevant circumstances and context of their preparation.

(2) Respondent's counsel, Hulteng, and his bargaining notes for August 10

As noted above, the Respondent's counsel, Hulteng, testified respecting his bargaining notes. He also testified directly respecting the bargaining session of August 10. He refreshed his memory respecting bargaining in some cases by reviewing his bargaining notes and in other cases by reviewing Norr's bargaining notes. The notes of Norr and Hulteng were identified and placed in evidence along with the earlier notes of the Respondent's prior counsel, Murphy, by all-party stipulation.

The instant hearing had moved along to the surrebuttal stage when counsel for the Charging Party sought and obtained my permission to temporarily take custody of counsel Hulteng's original bargaining notes for the August 10 bargaining session—and only the notes from that session—for the purpose of submitting the four pages of handwritten notes to a forensic document examiner for non-destructive testing designed to ascertain if the document had been subject to alteration or emendation.

At the next session and final day of hearing, Mr. Floyd Cunningham, a forensic document examiner, was called by the Charging Party. Mr. Cunningham's long experience as a forensic document examiner and his status as an expert witness in his field were uncontested. He testified that he had been retained by the Charging Party to determine if all of the handwritten entries on the notes were made with the same ink or different inks and if all of the handwritten entries were written by one individual. He further testified he had examined the four pages of notes as requested, applying the skills and science of his craft to the question presented.

Mr. Cunningham testified that he was able to ascertain with confidence that in four instances, additions to the notes had been made to the notes in the original writer's hand, but utilizing different inks and creating indentations on the documents underneath the document when they were added. Thus, it was clear and I find that four segments of the notes were later additions added to the note pages after the original serial entries had been made. Cunningham further testified that he could not conclusively state that "no other none of the other writing on [the August 10 Hulteng bargaining notes] was not added at a later date." Thus he found 4 changed portions and could not certify there were not more.

Respondent counsel Hulteng testified following Cunningham. Counsel Hulteng testified that the Charging Party's request to withdraw and submit his original bargaining notes to a handwriting expert at the previous day of hearing had caused him to examine his August 10 notes in the interim and to review in his mind the circumstances of their creation. He testified that, upon doing so, he recalled that in a November 9 bargaining session he had had exchanges

[13] "Clearly, they do reflect statements made and positions taken, summarized from the perspective of Respondent's negotiators. They have, therefore, been reviewed with due regard for their conceivably 'slanted' representations." *Mack Trucks*, 277 NLRB 711, 725.

with union bargainers respecting what was said in bargaining on August 10, which prompted him to review his August 10 notes on November 9 with the bargaining table exchange of November 9, in mind. In reviewing his August 10 notes he testified:

> To the best of my recollection, I got to admit, I didn't do a great deal of forethought or a great deal of afterthought for that matter. But I definitely believe now and do recall that at some point during that day, I just went in and added a couple of those notations, which I felt was certain were things that we had said on August 10.

Counsel Hulteng specifically identified the additions he recalled:

> Q. [By Respondent counsel Lichenstein] And after listening to Mr. Cunningham's testimony this morning, are you able to identify which portions of the notes you then recall when you had made -- where you had made additions?
>
> A. Yeah, I think I recalled actually before his testimony in the -- that next date when you and I spoke; we looked at the notes. I think -- there were the three portions that I definitely looked at and saw, I'm pretty sure those were the added portions. The fourth one Mr. Cunningham identified today, I've got to say, I don't have any particular memory one way or another. It could well be that I added that, that's the word "sometimes." But it rings no bells with me at all.

Hulteng in describing his additions to his notes reiterated that it was not his usual custom or practice to make additions to his bargaining notes. He testified:

> Q. [By Respondent counsel Lichenstein] Okay. And with regard to going back and making these additions to your notes, was that a common practice of yours to do that?
>
> A. No, it's -- quite frankly, I rarely will -- rarely go back and look at prior notes except when I'm preparing proposals and I go back and I usually look just at asterisked portions to see what issues I need to address with proposals. So, this was very unusual. And the reason it's jogged my memory is because it was that day when the Union was making a big point about what their notes showed. That's why I went back to look at my notes.

(3) The Parties' arguments addressed to the Respondent's counsel Hulteng's August 10 bargaining notes and his testimony respecting the August 10 bargaining session[14]

The Charging Party, in addition to making general challenges to Hulteng's notes and testimony, specifically attacks the August 10 bargaining notes and testimony concerning those events because of the emendations. Counsel argues on brief at 49–50:

---

[14] The arguments here discussed address the use of the notes in resolving questions of credibility precedent to resolving the allegations of the complaints. The Charging Party also moved for recompense for its costs of the utilization of its forensic document examiner. And the Charging Party sought special disciplinary proceedings again counsel Hulteng. Those two matters are discussed independently later in this decision.

The other reason why the Club's notes are not reliable is because Hulteng altered them. Hulteng admitted to adding two phrases and a sentence to the August 10 bargaining notes.[12] The expert forensic document examiner identified a fourth change to the notes in Hulteng's handwriting that Hulteng testified he did not remember. TR 1850-51. As a result, the Club's notes cannot be relied on as accurate and genuine representations of what was said in bargaining. *Sunshine Piping, Inc*., 351 NLRB 1371, 1378 (2007) (stating that records altered by employer "cannot be relied upon as accurate and genuine representations of Respondent's administration of its attendance policy"); *Liquid Carriers Corp*., 1991 WL 1283275 at n.9 (JD-74-91) (ALJD) Aug. 30, 1991) ("I do not think that bargaining notes in this form have any particular guarantee of reliability. As is obvious from an examination of the handwritten notes, given their spacing, margin notations and general untidiness, (and leaving aside the experts' testimony), it simply would be too easy to make insertions and changes after the fact.").

An adverse inference should be drawn against the Club's notes where they conflict with the Union's notes. *Precipitator Svcs. Group, Inc*., 349 NLRB 797, 800 (2007) ("It is well established that an adverse inference may be drawn against a party that introduces incomplete or altered evidence, especially in response to a subpoena. Because the documents provided by the Respondent have been altered, we infer that they do not support the Respondent's claim that, at the time Howell reapplied, the Respondent had wholly reverted to hiring only in Tennessee.").

[12] The parties stipulated only that the notes were authentic and not that the notes accurately state what was said. Tr. 84–86. Since Hulteng altered the Club's notes, the Club notes would not be admissible for the truth of the matter under the hearsay exception for business records. That rule encompasses:

> A record of an act, event, condition, opinion, or diagnosis if:
>
> (A) the record was made at or near the time by—or from information transmitted by—someone with knowledge;
>
> (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
>
> (C) making the record was a regular practice of that activity;
>
> (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and
>
> (E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

Fed. R. Evid. 803(6). There are three ways in which the Club's notes do not satisfy this hearsay exception. Hulteng did not write all of the words in his notes at or near the time they were spoken. Hulteng testified that his regular practice is to not alter bargaining notes, but he altered the Club's notes. The alterations make the notes generally untrustworthy.

The General Counsel supports the Charging Party's argument that Hulteng's changes to his August 10, 2010 bargaining notes, as described above, render both his testimony and his bargaining notes respecting that day unreliable.

The Respondent argues that respecting his August 10, 2010 bargaining notes, Hulteng deviated from his normal practice of leaving bargaining notes unaltered and suffered an initial failure of recollection respecting his emendations to those notes. That said, however, the Respondent urges the notes be credited and Hulteng's testimony respecting the bargaining be fully credited.

(4) Findings and conclusions respecting Hulteng's bargaining notes, and testimony respecting bargaining on August 10[15]

The four pages of Hulteng's handwritten bargaining notes for the session on August 10 are directly challenged by the Charging Party and the General Counsel as not meeting the standards of Federal Rule of Evidence 803(6)[16] in that the notes were not established as having been "made at or near the time" of the matters recorded. They further argue that Hulteng failed to recall adding entries to the notes some time after their creation and, even as of the last day of the hearing herein, had testified he had no memory one way or the other as to whether he had made the fourth amendment to his notes specifically identified as an addition in Hulteng's hand by Mr. Cunningham, the expert and essentially unchallenged document examiner. Their argument proceeds: Given that Cunningham could not give assurances that other emendations had not been made to Hulteng's notes, that some changes had admittedly had been made, and that Hulteng failed to identify at least one emendation he had made, for all of these reasons, the notes cannot be found to bear any contemporary relationship to the events of the August 10 bargaining and must be regarded as inadmissible hearsay unsheltered by FRE 803(6).

A related argument made by the Charging Party with the agreement of the General Counsel is based on FRE 803(6)'s admonition that the business-records exception applies to materials "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." The circumstances surrounding preparation of the notes, the Charging Party argues, manifest just such a lack of trustworthiness. As such, the business-records exception is not applicable to them. As mentioned above, the Respondent opposes these conclusions and argues that there was nothing suspicious about the notes' creation.

The General Counsel and the Charging Party focus further on Hulteng's initial failures of recollection concerning the emendation of the notes, as well as his more recent trial testimony that he could not recall whether or not he had made the fourth entry identified by the document

---

[15] My findings here are limited to an evaluation of the Respondent counsel Hulteng's bargaining notes and his testimony respecting bargaining on August 10, 2010. My findings respecting what occurred on that day in bargaining in light of all the evidence are recited immediately below in section B. My rulings on the other motions of the Charging Party arising out of this dispute are addressed at the end of this decision.

[16] Fed. R. of Evid. 803(6):

> Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

examiner as having been added in his hand. They argue that Hulteng simply has demonstrated important and continuing failures of recollections such that his testimony as well as his notes on the events of August 10, 2010 cannot be relied on or credited whatsoever. And, they add, the notes of that session, demonstrated to be unreliable above, can provide no legitimate basis for refreshing recollection; yet, Hulteng admitted he refreshed his recollection using the notes prior to his testimony. Again, the Respondent disagrees with the argument. It characterizes Hulteng's testimony as truthful and forthcoming when he discovered his earlier failure of recollection.

Moving to my conclusions, I find I do not need to reach the Charging Party's trustworthiness argument. I need not reach the issue because I find, as argued by both the Charging Party and the General Counsel, that there is doubt respecting which entries were undertaken at or near in time to the bargaining session and that this doubt undermines any finding that all parts of the notes were contemporaneous with the events they record. This I find fatally undermines their credibility.

Under all the circumstances of the notes creation and emendation, I find the notes compromised. Therefore, I ascribe significantly less weight to the notes than other evidence of the events of the bargaining session. Consequently I will not base any findings on them herein save to the extent they corroborate other credited testimony respecting the bargaining session of August 10. Since I find the Union's notes are free from the disabling circumstances respecting Hulteng's notes, I credit and rely on those notes over those of Hulteng.

Turning to the testimony of counsel Hulteng respecting the August 10 bargaining, I also find his testimony lacks credibility as a result of the circumstances presented. Counsel Hulteng, as he testified, refreshed his recollection with these notes and yet his memory of altering them was not also refreshed. I find this fact is persuasive evidence that his memory of the events of this session were dim indeed and may not be relied on. I draw the same conclusion respecting his memory of events from the fact that he was unable to recall with certainty whether he had made at least one entry in the notes contemporaneously or well after the fact. Once again his inability to recall making any alterations initially and continued failure of recollection with respect to at least one alteration substantially undermines my confidence in the accuracy of his memory of events and hence his testimony concerning the bargaining session on August 10. Therefore, and as with the notes themselves as found above, I will rely on his testimony of the events of August 10, 2010 in these regards only when and to the extent that testimony corroborates other credited testimony.

b. Findings concerning the collective-bargaining session on August 10

The parties met in bargaining on August 10. The Respondent submitted a written document entitled, "Revised Final Employer Proposals," which made changes in its previous offer including changes to contract language earlier marked as tentatively agreed upon. The new proposal, *inter alia*, contained three changes in earlier tentatively agreed upon contract sections. The first was Contract section 2, theretofore titled: "Union Shop" but in the new proposal titled, "Maintenance of Membership and Hiring":

Section 2: Maintenance of Membership and Hiring

> All employees covered by this agreement shall, on the thirty first (31st) day after their employment, or who are members of the union as of the effective date of this Agreement, whichever is later, become members of the Union and shall retain such membership during the period of this Agreement as a condition of their employment. All employees who elect to become members of the Union during the term of this Agreement shall retain such membership during the period of this Agreement as a condition of their employment.

The Union's notes covering counsel Hulteng's description of this clause at the beginning of the bargaining session are as follows:

> Section 2, … earlier proposal was phrased in terms of agency shop, which was not defined. What we've done here is try to make it clear and straightforward. Everyone who's now a member would have to maintain membership. New hires would have the freedom not to become members.

The second proposed contract section is section 6, seniority:

> Section 6: Seniority
>
> (a) In the event the Employer finds it necessary to lay off employees or reduce hours due to slackness of business, such lay-offs shall be on the basis of seniority within seniority shall be determined within classifications, i.e., the Employee on duty in the establishment having the shorter period of continuous service with the Employer shall be laid off before any other employees having a longer period of continuous service. Employees shall be laid off within classification based on seniority, work performance, qualifications and efficiency and quality of service. The Employer agrees to give preference to laid-off employees in re-employment by seniority within classification, provided the lay-off does not exceed twelve (12) months. Senior employees shall have preference of full time employment, at all times. Reduction of shifts or hours shall be based on seniority within classifications. The Employer will distribute shifts to senior employees before distributing shifts to employees with less seniority, with the intention of providing as many hours of work as possible to senior employees. For the purpose of this section, classifications shall be those listed in the wage scale. All other classifications shall be deleted: [list of classifications].
>
> * * *
>
> ~~(f) In the case of layoffs, an employee with at least three (3) years of Company seniority may return to the last classification from which he or she came after ten (10) consecutive days of layoff. Such employees may bump other employees in the former classification on the basis of the laid off employee's time worked in the former classification.~~

The Union's notes covering counsel Hulteng's description of this clause at the beginning of the bargaining session are as follows:

> Section 6 - we do have a proposal, which arises from our experience over the last several months. We would want to be able to make decisions on layoffs based not solely on

seniority but on work performance. We believe we have gotten a superior quality of service from the workers during the lockout and that has to be valued.

We also proposed to delete section F, having to do with bumping rights.

The third, formerly tentatively agreed upon element that was modified for the first time in the August 10 proposal is a proposed expansion of the expired contract section 17, Intention. The expansion provides new parenthetical language limiting the Club's right to subcontract. In contrast, the earlier clause in part gave the Club the right to subcontract work and to introduce new methods, techniques, and/or equipment subject to a parenthetical limitation:

The old parenthetical limitation in the tentatively agreed upon clause read:

> ([P]rovided that such subcontracting shall not apply to the classifications covered by this Agreement, except insofar as incidental work for which subcontractors regularly are employed, such as carpet cleaning, window washing, marble floor cleaning, dry cleaning, or for subcontractors or other employees performing renovation work to restore the Employer's facilities is involved.)

The new proposed parenthetical limitation on the Club's right to subcontract is as follows:

> ([P]rovided that such subcontracting shall not take place without first providing the Union 30 days notice and an opportunity to meet and confer regarding the subcontracting and its effects, if any, on bargaining unit employees.

The Union's notes covering counsel Hulteng's description of the new language in the parenthetical clause at the beginning of the bargaining session are as follows:

> Section 17 - the proposal made to you in May on this subject, we are continuing to propose a change in that section. I have changed the language slightly. The last proposal called out specific groups that we might want to subcontract. This opens it up to subcontracting for any group with a meet and confer.

Following Hulteng's overview of the new proposal, discussion took place with the Union disagreeing with the proposal's specifics and what it saw as the generally regressive aspect of some of the new language. The Union's notes reflect the following exchange:

> RH: you're not misreading that there's a firmness of position. At first I wasn't sure where they were coming from. I get a sense that the experience during the lockout has not led the membership to feel that their economic proposals should be modified, and has led to reflection on some of these other topics.
>
> M[ike] C[asey]: the fact that the proposal is now worse than the previous one says to me - and this is not a board charge - they probably understand, and you definitely do based on your experience - you must know this is getting us further from settlement, not closer. Seniority, subcontracting, open shop - these are core issues that no self-respecting union would agree to. There is no desire to move closer. The clear message is, you can come back to work and it will be worse than when we locked you out.

RH: the one thing I sensed from the beginning is that - I wasn't sure where the union felt their leverage was at this point. Both sides have taken shots and we can't undo history. Then people re-assess based on their experience. You've decided to pursue this because you believe your proposal is in your members' interests. Our people look at the situation and draw conclusions. There was a decertification election and it was relatively close. There are divided views within your group and we won't close our eyes to it. Our assessment is that the union doesn't have a lot of leverage at this point The experience of the lockout hasn't been pleasant, but we think we've benefited in terms of service and quality, and nothing about it has caused us to think the economics were unjustified on the club's part. I come in this late in the game, but it's one of those situations - labor disputes can go different ways. Things can change, you could convince us, but we're giving an honest assessment of where we're at.

MC: clearly there is no desire to end the dispute.

RH: we want to end it on this basis. (pointing to Club contract proposal).

MC: but you know that's impossible.

RH: I don't think you have any leverage, so if I were you, I'd try to resolve it on terms acceptable to the club.

WL: on the eve of the lockout we were 1k apart, and the day after we were 5k apart. I believe it has cost the club more than 5k per month. This info request is about figuring out how to have both - a clean club, good service, and no loss.

RH: the tactics the union has used have, rather than winning members over, have convinced them that your interests are not theirs.

During the session the Parties discussed future bargaining dates and frequency of bargaining sessions. The Union's notes reflect the following:

WH: I think we should just schedule our next meeting. We should plan on getting back together. When we were very focused on bargaining we'd gotten in a rhythm of every Tuesday or every other Tuesday.

RH: you want a response before we meet again?
WH: yes, and I'm on vacation next week. We could start out the 31st, so that gives you a couple weeks.

RH: I'll be in negotiations in LA and Sacramento every day the week of the 30th

WH: how about the 26th or 27th

RH: there's not a single day I could do it that week. The best days for me would be the 13th or the 15th. "

WH: Why don't we do both days?

RH: I won't commit to both days unless we are getting somewhere.

WH: we can do earlier if you want

RH: I can commit to the 13th. But you guys will have to make substantial movement

WH: we might be able to. Or come up with creative new ideas, so we'll think big too.

RH: on the union shop and subcontracting, the signals have been made that they felt we needed to go in a new direction.

WH: I think one mistake we've made is in thinking that we could get to an agreement on many issues besides health cost sharing. We had a productive meeting, I think in April, where it seemed we were getting close to agreement on contract issues, but they've been made moot I think we've been thinking too small. If it's not really about the 5k difference - I still think we should do a costing model- if it's bigger than that, we'll look at that and analyze the pieces that are barriers from your end.

RH: if you've got big picture ideas, we'll definitely hear them. If it's going in a direction that could settle it, we could have more frequent meetings.

WH: what's not working is since the beginning of the lockout, meeting every 6 weeks. Between the meetings, there have been several board meetings and things have changed. So let's try a new approach. Let's think creatively and analyze the barriers to settlement Let's meet regularly, maybe once a week. Tuesdays are a good time for us. It was good to have a regular rhythm.

RH: we're open to it, I just have to say we'll need to assess it. It's one thing to meet when you're making some progress. But you'll have to convince us we can bridge this gap.

ME: it's not just about the money anymore, so we need to reevaluate.

RH: there aren't a lot of issues, but they're big issues.

WH: there are still outstanding grievances. I don't know if you'll deal with them – the immigration thing, and Francisca's layoff, which the Board has put back to arbitration. It was subcontracting and assignment of work to a non-bargaining-unit employee. Back pay has not been resolved.

RH: we're not proposing to subcontract anything, just to have that option in "the future".

The bargaining exchange continued to include what would occur upon reaching agreement. The Union's notes assert:

MC: if we were to accept the terms of the agreement, I take it you would keep your replacements.

RH: if you want to settle, we'll talk about it

MC: we want to know your position because your language allows you to have new workers take work from old workers,

J[erry]O[lson]: we'd need to know who is and isn't coming back, so it's hard to answer that questions.

RH: it's the thing that comes up when you're trying to settle a dispute. Nothing in this proposal says anything about that.

MC: except the seniority language.

RH: it just says seniority's not the end-all and be-all. If the lockout ends, we'd want to bargain over who's coming back and in what positions?

MC: so are there some who you would not contemplate letting them come back to work If they wanted to?

RH: we haven't given it much thought We are proposing that other factors besides seniority should be taken into account, and would probably take the same position on workers returning from lockout.

WH: so the 13th, 1 pm sounds good. If you don't want to do the 15th, let's pick the 21st.
RH: I'm not going to commit to another date till I see how this one goes. If something looks like it's moving - the 21st I can't, but – if things aren't moving, why would we meet.

WH: I think there are plenty of things to talk about. We've spent 5 hours together total in the past 6 months. In the interim, there are all these new proposals that we haven't had a chance to understand their impact There are issues the club has raised that seem to be impediments to settlement, so we should work to eliminate them.
RH: we need to take this one step at a time. Let's see how it goes on the 13th and then set a date.

WH: the pattern has been that we hear "oh, we'll get back to you," then get a date 6 weeks later. That's what was challenging about my own schedule in the beginning of bargaining. The approach you're suggesting has been proven not to work. So I want to tentatively schedule a few dates at a time. We can cancel them if needed.
RH: I just don't agree. We'll set a date for the 13th, and then schedule a date from there, promptly if it looks like we're getting somewhere.
WH: it's clear from the last 6 months that not meeting does not work. Maybe meeting won't either, but let's at least try it.

RH: I just won't commit to more than one date without seeing how it's going. We'll get this info to you, and you'll give us an email about the outstanding immigration grievance. Jerry and I can talk about the health eligibility stuff that I don't fully understand yet. If there are other outstanding grievances, let us know.

WH: there isn't one as far as the bargaining goes, so that's good to know that I wasn't missing something.

5. Bargaining after August 10

The parties met again in bargaining on September 13. The session recurred to the Respondent's proposed contract language respecting seniority. During the discussion, Ms. Huber asked what had caused the change in the Respondent's earlier acceptance of straight-seniority contract language that had been tentatively agreed to. Ms. Norr's notes reflect the exchange:

WH: there was a time when the proposal was - or we came to an agreement where specific events or shifts could be handpicked. So what changed from that to this? What is the experience that has led to this proposal, because these survey results were from June, and we came close to a TA in December.
RH: and the premise was that both sides were working to get a contract for the existing membership, so neither had the opportunity to assess other options. When the club did bring in new people, it was an eye-opener, and we see that there are lots of individuals providing good service. so now we have more ability to compare, and we'd like to get the best of both.
WH: how do you compare?
RH: attendance, discipline, etc.; qualifications, which includes how much time they've spent in food service and what experience they'd bring; efficiency; quality of service. The club exists to serve its members.
WH: the other piece is that the chef changed. How do you know the improvement is not a result of new chef or menu?
RH: I have no idea when the chef changed or how that plays in.
L[ian]A[lan]: Dec 1, 2009.
JO: there are 2 specific examples. One is a bartender who we currently have. I thought the bartenders we had before were outstanding. But we have one who would outshine all of them. In a perfect world we'd have enough business to just insert this person in, but the reality is that it's not true. Steve or Sherry might not make it. In housekeeping we have someone who is generating tips, maybe the best worker we have in any department. It's not about management changes, just the individuals we've been able to recruit and hire. The shift selection is relevant for a whole 3-year contract. The new proposal is about melding the two workforces.
WH: so it's about dealing with the new workers you've become attached to.
RH: we don't know how many will want to come back. If we can't accommodate them all, we'd like to choose based on these factors.
WH: you can imagine our concerns. One is that workers may have issues with service but could improve. We actually don't have a record of discipline about performance here. Giving people a fair opportunity to improve is a factor we'd want in the mix. Maybe the current just cause provision is inadequate, but generally it accomplishes those goals. If someone's not performing up to par, there's a way to deal with that. Is the current staffing level similar to before the lockout?
JO: in some it's comparable, in some less. Kitchen is less.
WH~ fewer people, or work hours?

JO: probably both. Less bodies, but I don't think we're paying OT, so probably less overall. Results may be related to new management.
WH: are there other supervisors?
JO: sous chef position is not filled.
WH: there was a comment that came up with food and bev and bag people. The club should set standards and guidelines for staff - train them to say hello, etc. Certain protocols. What training had you done before and since the lockout? Has that area improved?
JO: I'd be kind of winging it if I were to respond.
WH: complaints re waiting for an hour in the Hacienda - what was going on there? What have you changed?
JO: no, and the specific responses don't hold as much weight as the numbered responses. Generally, happy people don't write comments. We just use them for identification of areas -like if there are multiple responses re slow service in Hacienda. If less than 85 or 90 percent of membership are very satisfied, there is a weakness, because the majority of departments scored those rankings. Admin, golf course, communication, governance.
WH: so this was a flat line from a previous year?
JO: yes.

Somewhat later in the session the subject was revisited, as per Norr's notes:

WH: we went through all that to say that we're no~ convinced that loosening seniority would resolve the issues. If there aren't other additional changes made, it would guarantee that people would come in with deficiencies and keep them, or get blamed for other stuff, and make it likely seniority would hold less weight. Having said all that, looking at Jerry's example of superstars in the bar and maintenance - I agree, probably some percentage of the workers won't come back, and it could be that there's no problem and everyone can co-exist, or that we'd have to make some adjustments. I'm sure if it's a few people, one per department, I'm sure we can figure it out. The best time to have that conversation would be right before the end of the lockout. We can't predict today what the impact of that is. You could go hire more staff just to layoff locked-out workers.
RH: we would not hire people we don't need. We've been operating at a lower level of staffing.
WH: but it allows for it. There might be a new management team. We're focused on what could happen. Frankly, we do honestly believe that there are a lot of things about this lockout that make no sense. It's completely disproportionate to what everyone says their bargaining goal is.
RH: what happened a year ago, or 6 months ago, is history, and we are making decisions based on that
WH: it's disproportionate. We could work it out the night before the lockout ends.
RH: this isn't a lockout settlement, it's a CBA with duration, that goes beyond resolving the dispute. I agree that there needs to be a specific agreement on individual issues at the end of the dispute.
WH: this proposal, as we understand it, is worse than being locked out. It requires to union to allow the company not to recall the people we represent. We can't imagine how this is better than the current situation.
RH: our proposal would still leave everything subject to grievance and arbitration. The employer would make the first judgment call, just like for promotion or termination.

A[ngel]M[elendez]: this is in the name of all my co-workers. This includes even people who were supposedly on the company's side. We are never going to give up seniority, because we aren't going to take the risk that we can't come back to work. I think I've always worked well, but I can't take the risk that a manager will prefer a new worker. No one will ever accept giving up seniority. If you're really negotiating in good faith, let us go back to work while we negotiate. We can be outside for however long is necessary, we'll never give up seniority. That goes for everyone.

JC: not even the people who supported the original proposal.

AM: even Steve, you said you wanted to put a new bartender ahead of him, how do we know you wouldn't do that to us?

JO: I never said I'd put someone ahead of Steve. I just heard you won't negotiate and you'll threaten us.

WH: we can definitely talk about how to address superstars among temp workers. We're extremely nervous about it.

RH: does what he said reflect that union's position? Because it sounds like we're at an end.

WH: we aren't refusing to bargain over it. You just have to understand how we're reading it. I'm listening to you saying it won't be unilateral, and trying to get my head around it. But if we're being asked to let the club end the lockout, but not bring back the locked-out workers, how could we accept that?

RH: we don't know who will want to come back. This may be a non-issue. As a matter of contract principle going forward, we are firm that seniority will not be the only controlling factor.

WH: I think his statements reflect how we think about the impact of this proposal. People are upset about it and can't imagine how it could work. This was a useful conversation and understanding where the replacement workers fit in is helpful. I need to do some research and ask some questions over how something like this could be bilateral. We can certainly make a counter.

JO: please let the record reflect that I did not propose any current worker replace any locked-out worker.

WH: sure, and maybe it's all moot. Probably why Angel used the example of Steve – he and I don't have a good relationship over the past year, but he's put in his time. The implication that he may not make the cut sets his radar off.

JO: what happens if we sign an agreement and everyone goes back to work, then after 6 months, Steve goes south for personal reasons, and other bartenders are shining, and business dictates a layoff. It would make sense for the company and all the bartenders in the pool that the weakest link leave. There have to be other factors besides seniority.

WH: the contract already includes just cause and if someone is not qualified to do their job. The other thing - this is something that shocked us. After hearing for so long that we have to remain competitive - a majority of competitors are paying for dependent coverage, at high levels -70,80,90 percent. You are proposing less than 10. We are surprised to see that your competitors are paying at such big levels.

We looked at your adjusted eligibility proposal. The last one was confusing, and this one is too, because there are two different numbers in it. On page 39, section 35, what does this paragraph replace?

JO: the point of clarity is, if you’re in the program and you fall off, how do you get back in?

Bargaining continued until Mr. Olson sough an end, per Norr's notes:

> JO: before we were getting wrapped up in multiplying 28 times 4, not 52 weeks in a year. I have to wrap up now.
> WH: okay, so we should continue to meet Every week is our suggestion.
> RH: no. You've had our proposal for a month. We know we took some time to get you the information, we acknowledge that, but we've spent a whole day here with no real proposal being exchanged. We spent time downstairs while you talked - you should talk between meetings not during them. If we're going to come here, we need to come with the notion of getting somewhere. I'm concerned from what I heard on seniority that your view of the world is very different.
> WH: our views on the proposals, yes. Not necessarily the world.
> RH: we don't want to cut short the opportunity for dialogue, we don't want to waste time.
> WH: we started at 1 and ended at 3:30. That's not a long session. We caucused for 45 minutes. It's hard to turn around a counter quickly when I just got the info on Friday. I have more questions about subcontracting too. By not meeting, and not dialoguing, we don't get closer. Every proposal we've gotten from you since December has gone backward. I'd rather try to narrow the area of difference, not expand them.
> RH: you're going to have to make some major moves.
> WH: it is hard to make moves when there's a moving target. That makes things more challenging.
> RH: I don't think it's a moving target. The situation is unfortunate. Both sides made decisions, there were opportunities for resolution that did not pan out. Our direction from the club is clear - these proposals need to be in the contract, and we've got to see movement from you.
> JO: your membership made it clear that they will never accept this. So give us a counter.
> WH: we said we won't accept elimination of seniority. We see this as a huge loophole.
> RH: we're not seeing any real prospect that you're going to make movement to get an agreement
> JO: if you could copy me on your letter of request.
> RH: Jerry is in a better position to collect this info.
> WH: so when shall we meet again?
> RH: when will you have letter ready?
> JO: submit available dates to us with letter.

Following the September 13 bargaining session the Respondent and the Union exchanged emails discussing the application and consequence of the application of the Respondent's seniority proposals to the recall of the locked-out employees as well as the Union's desire for more frequent bargaining meetings.

On October 18, the Union filed its charge against the Respondent in Case 32-CA-25397. That charge asserted under the charge form entry: "Basis of the Charge:"

> During the last six months. the above-named Employer has failed and refused to bargain in good faith including but not limited to: refusing to meet and bargain at reasonable times and by continuing to lockout employees in support of an illegal bargaining position. The Employer's proposal to eliminate seniority as the basis for scheduling work and

layoffs and/or to allow replacement employees to displace locked-out employees after the lockout ends is unlawful. The foregoing bargaining position converted the lockout that began on or about February 25, 20010, into an illegal lockout. During the past six months. the above-named Employer discriminated against employees because of their support for the Charging Party by maintaining an illegal lockout.

The parties met in two sessions in November 2010 and thereafter. No agreement has been reached. The lockout continues.

C. Other Matters

1. Subcontracting matters

The Club maintains three kitchens: two in the main building—the main and a separate grill kitchen—and a third smaller kitchen in a separate structure. Commercial kitchens often, as is true in the Club's operations, utilize three levels of kitchen cleaning. On a daily basis general cleaning occurs during which the kitchens are swept and mopped, floors and walls are wiped down, and the surfaces cleaned. The rubber mats are hosed, and the garbage is taken out.

On a weekly basis, more thorough cleaning occurs. It includes sweeping and mopping underneath the counter space, the appliances, refrigerators, and stoves; moving and cleaning the bread and pot racks; removing, degreasing, washing, and replacing the floor mats; and removing and cleaning food from the drain covers.

On a monthly basis deep kitchen cleaning takes place. It utilizes task-specific high pressure spraying equipment and chemicals to degrease equipment and appliances and to clean out the drainage system. The work area is covered with plastic sheeting and the surfaces and apparatus to be cleaned are sprayed with chemicals; hoods are washed and filters are changed.

At the time of General Manager Olson's arrival at the Club in 2008, the deep kitchen cleaning was subcontracted out to a company that monthly sent in a night crew to do the work. The remaining kitchen cleaning was done by the bargaining unit. Olson discontinued the contract with the kitchen deep cleaning service in early 2009 and that work was then done by the bargaining unit as well. These changes were initiated by the Club without notification or discussion with the Union.

Mr. Olson testified that he was not satisfied with the kitchen cleaning at that point being done by the bargaining unit and at the request of his new chief chef, Olson hired a new, different cleaning subcontractor for deep cleaning who began work in February 2010. The change transferring the work from the unit to the subcontractor was initiated by the Club without notification or discussion with the Union. Olson testified that the new service performed the same duties as the previous monthly deep cleaning contractor, but did the work on a weekly rather than monthly basis.

The parties did not agree on whether or not the work done by the new contract cleaning service, now done on a weekly basis by the new cleaning contractor, was coextensive with that done by the previous cleaning contractor or whether the new contractor was doing additional

work that had always been done by the bargaining unit employees on a weekly basis.[17] Soon after the new contractor began its work at the Club, the Union in bargaining raised the subject of the duties of the new cleaning contractor with Olson and he testified that he told the bargainers that the work being done was the same as the previous cleaning contractor, but that Union bargainer Huber challenged that assertion and indicated that the contractor had expanded its scope and was now doing additional duties beyond the "deep cleaning" done by the previous contractor.[18]

Ms. Francisca Carranza, a club unit janitor since 2008, testified that from the commencement of her employment she was involved in general cleaning and cleaning of the three club kitchens on a daily basis and on a more thorough basis weekly. She testified that the kitchen staff cleaned the counters and the stove daily. She and a unit member colleague did the other daily kitchen cleaning. An outside company came in monthly and chemically treated the kitchen hoods and changed filters. There was also a more intensive weekly cleaning, which she also did. As to the weekly cleaning of main building kitchens she testified:

> At the time, we had to sweep and mop underneath all the counter space, all the appliances, refrigerators, stoves. We needed to move all the racks where they put all the bread and all the pops. We needed to move all of that. We needed to remove the mats where the cooks stand on. Remove those, wash them, remove all the covers on the grill -- I mean on the drains and clean them out, because there was a lot of food in there. We had to degrease all the mats and wash them and put them back in place. It was -- it took a long –it took longer than the usual cleaning that we did every day. And we would take the garbage out.

From February 2009 on, Carranza worked the night shift, and she and a unit shift mate would do the thorough cleaning on Sunday evenings so that the main kitchen—which was closed on Mondays—would dry out before going into use on Tuesdays. By May of 2009, the weekly thorough cleaning was reassigned to the unit member kitchen staff. Carranza was laid off for about a month starting in mid January 2010. Upon her return to work, she testified to observing some of the traditional weekly cleaning work being done by two other individuals whom she did not recognize. She testified:

> They were cleaning the kitchen. They were removing the mats and cleaning the floors, and everything that we did -- that I used to do before, for the more thorough cleaning of the kitchen. But they were doing it -- on the days that I saw them, they were doing it. Then, one day, I saw the lady cleaning the top of the stoves also.

I observed Ms. Carranza closely during her testimony. She convinced me that she was testifying from her long experience in Club kitchen work and a memory of events. Her

---

[17] The Respondent argues on brief at 85: "Also, the subcontracting in 2010 is not materially different in kind or degree to what took place in the past."

[18] The invoices from the two different cleaning services utilized reveal that the cost of services was equivalent but confirms that the earlier contract cleaning was performed monthly and the later contract services were more frequent.

demeanor led me to conclude she was testifying honestly and with a desire to answer the questions presented completely and truthfully. I credit her testimony.

Employee Carlos Hernandez worked as a cook in the main kitchen for many years. He testified that the kitchen employees did daily cleaning of the kitchens but several years after he started, the daily kitchen cleaning work was transferred to the maintenance department unit employees. He also testified that there was a monthly contract cleaning service that was used. The service supplied their own employees who came at the end of the day and used special degreasing machines and chemicals to clean the hoods, stoves and the overhead extraction fans.

Mr. Hernandez testified that just before the lockout he observed the new contract cleaning employees: "Sweeping, cleaning the floor, removing the mats to have -- to clean them." He specifically testified that this work was not the same type of cleaning that was done by the earlier outside company.

As with Ms. Carranza, I closely observed Mr. Hernandez during his testimony. He also convinced me that he was testifying from his long experience in Club kitchen work and his memory of events. As with Ms. Carranza his demeanor led me to conclude he was testifying honestly and with a desire to answer the questions presented completely and truthfully. I credit his testimony.

2. Rule violation complaint allegations

At relevant times the Club has maintained employee handbooks (one for represented and one for unrepresented employees) which together apply to all employees and are issued to them. Each contains the following two identical rules in its section "Standards of Conduct":

> The Castlewood County Club feels It is important that you know and understand the standards and conditions of your employment with us so that you can concentrate on doing your job to the best of your ability. The following is a list of conduct that will result in disciplinary action and/or termination.
>
> * * * *
>
> 17. Unauthorized presence at [Club] member functions and member areas, including dining room, bars or lounges.
>
> * * * *
>
> 20. Unauthorized distribution of literature or posting or notices, signs or writing In any form on Club premises during working time and in work or member areas. If you wish to have something posted, bring it to Management and they will determine its suitability and post it for you.
>
> * * * *
>
> If you have committed any of the violations listed in numbers 1-9 (which are in bold above), you may be terminated without any prior warning. If you are suspected of any of the above violations, you may be terminated or suspended from your job while an investigation of the incident is conducted. If the investigations shows that you must be dismissed you will be notified. If not, you will be reinstated.

On or about early January 2010, the Club posted a memo to employees by the employee timeclock. The memo, on Club letterhead, stated:

We have been told that employees may be considering distribution of a letter about the Union bargaining to Club members on the premises. We sincerely do not want there to be any issues about this, and want to remind you of several Standards of Conduct that can apply to situations like those. In short, the Standards of Conduct provide that there may be disciplinary action and/or termination for the following acts:

• Unauthorized use of member facilities.

• Unauthorized presence at member functions and member areas, including dining rooms, bars or lounges.

• Unauthorized distribution of literature or posting or notices, signs or writing in any form on Club premises during working time and in work or member areas.

We have been fortunate to never have any issues about these kinds of things before this time, but have been able to all work together within these rules. We Understand that the current union bargaining process may make this a time of stress and difficulty for some employees. But let's all keep these issues in the right focus and deal with them at the right time and places. Please don't do things that will force us to take action against any offending employee for violation of these rules.

Thank you for understanding and following these rules.

3. The Club manager, Thomas Hunt

The Union during bargaining regularly engaged in hand billing or leafleting at the Club. On February 20, 2010, the Club held a crab dinner for its members and guests at which time the Union leafleted. Two unit maintenance employees, Francisca Carranza and Petra Medina, leafleted while standing in front of the main clubhouse at a covered walkway used by members of the Club that connects the main entrance of the Club with a parking lot, but is not a location where employees are stationed to work. Ms. Sara Norr testified she was with the employees while they leafleted.

After the better part of an hour, Carranza discontinued her activities and departed to commence work. Medina continued leafleting, in Norr's presence. Norr described what happened next:

Tom Hunt, who is I believe a clubhouse manager, came out and said that Petra needed to leave right then or he was gonna give her a warning; meaning a work discipline.

* * * *

Well, I told [Hunt] that the Union's understanding was that employees did have a right to pass out leaflets if they were not in their work hours and I told him that Petra was not in her work hours at that time. . . . And he said it didn't matter, she needed to leave or else he was gonna give her a write-up.

Q Did you speak to Petra [Medina] at all during this conversation?

A Yeah. She was listening, so I thought she might have understood, but she'd asked me what he'd said. So, I translated it for her.

* * * *

> I tried to show Tom [Hunt] a page that we had that cited some case law upholding an employee's right to leaflet when they are not in their work hours, but he didn't really look at it and said that Petra should leave or she was gonna get a warning. So, I said, you know, we would leave then because I didn't want her to get in trouble, but that he was probably gonna hear more backup about it from the Union because our understanding was that she did have the right to be doing that in her off – off hours.

Ms. Petra Medina also testified in Spanish respecting the event. She essentially corroborated Norr, asserting that Hunt came up to her, pointed his index finger in her face, and said something in English that she did not understand beyond recognizing the word "warning." She testified: "I turned to Sarah [Norr], and I said, what was it that [Hunt] said. And Sarah said, well, he just said you either leave or I'll give a warning, but I think it's better we should just go, so we left."

Mr. Hunt was not available to testify. I found Medina and Norr to be credible witnesses who tried to answer the questions presented them and who each exhibited a solid memory of events. I find the events took place as they testified.

4. The Club's director of golf, John Hughes

In the earlier part of July 2010, the Union was picketing the Club. One such picketing employee was Ms. Ruth (Peggy) Duthie, a longtime employee, who, upon arriving at the Club, initially parked her car at the Club Valley Pro Shop parking lot. There apparently had been an arrangement worked out between the Club and the Union where other parking areas were available for parking by employees, but the Valley Pro Shop parking lot was to be used only by Club clientele. The Club on this occasion had assigned its director of golf, John Hughes, a longtime club employee, to monitor the lot to insure the lot was used only by authorized individuals.

Hughes observed Ms. Duthie parking in the Pro Shop lot and approached her in her parked car. The two individuals, each alone, were familiar with one another both from their long service at the Club and because they attended the same church.

Ms. Duthie testified that Hughes had approached her car while she was still in the driver's seat and initiated a conversation. She recalled:

> [Hughes] says, "Well, I hate to tell you, but you have to move your car." And I said, "But I'm an employee." He says, "Just because you're an employee, you are not allowed to park here because of the protest."
> Q What happened after that?
> He says, "Can I tell you plain and planned, why don't you get a job?" And I said, "But I have a job." And he says, "Well, I hate to tell you this, Peggy, but the board of directors has said you folks are never ever coming back to work here." And I said again, "But I like my job." He said, "That means you, too, Peggy."
> Q And what happened after that?
> A I moved my car, and he went back to the pro shop.

Mr. Hughes testified that he had been assigned to watch the parking lot to limit its use by locked-out employees that day. He observed Duthie's car enter the lot and park. Recognizing Duthie, he approached her and had a conversation with her. He testified:

> And when [Duthie] got out, I recognized her, and I said, "Peggy, sorry, you can't park here today."
> Q And did she provide any response?
> A Yes, she said something to the effect that she didn't think that was fair. I'm sure it would be okay if I parked here today. And I said, no, you really can't. You need to move your car out of the parking lot.
> Q And was that extent of your conversation or was there more conversation after that comment?
> A There was a little bit more, yeah. Knowing her outside of the Club at church, I felt like I knew her. She's more of a friend than --
> JUDGE ANDERSON: So finish the conversation for us.
> THE WITNESS: Okay. I said something to the effect, these protests don't seem to be doing you any good; why are you doing this? And her response was a little convoluted. And so I didn't think it was going anywhere so I just ended the conversation.

Mr. Hughes specifically denied telling Duthie, or any other employee, on this occasion or any other occasion that the Club's Board of Directors would never let locked-out employees come back to work.

While Hughes at all relevant times was an admitted supervisor, he testified he did not work directly with the club directors and his responsibilities were associated with the Club's golf operations, which do not utilize represented employees. Further, he testified he had not been involved organizationally in labor relations, labor negotiations, or club formulation or discussion of negotiation strategy. He further testified that no one had ever told him that the locked-out employees would not be allowed to return to work.

Duthie testified that as a club food server she had served gatherings of club management, such as annual board elections of officers, that are limited to club management and officers and club members at which she observed both board members and Hughes in attendance. Hughes testified that he played golf with club board members and had conversations with them. Further he had heard them and club members make comments respecting the labor dispute and the protests, including negative comments.

The parties skillfully argued the relative strengths and believability of the testimony of Ms. Duthie and Mr. Hughes. The Respondent on brief correctly argues that Ms. Duthie was neither consistent in her recollection of the date of the conversation at issue nor linearly analytical respecting Mr. Hughes supervisory title and responsibilities. The Respondent concludes on brief at 76:

> Overall, Ms. Duthie came across as a well-meaning individual with a poor recall of events. She appeared eager to assist the Union, but ultimately unsure of what really happened on some date back in the spring or summer of 2010. Ultimately, wherever it conflicts with other record evidence, her testimony regarding the content of the conversation should be discredited.

The Charging Party argues that Duthie should be credited:

> The Board has long recognized that the testimony of an employee testifying against management is apt to be particularly reliable, inasmuch as the witness is testifying adversely to his or her pecuniary interest, a risk not lightly undertaken. *Wilshire Plaza Hotel*, 353 NLRB [305, at 316] (2008) (citing *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978)). While Duthie could not remember details such as dates, that does not make her memory of this key statement untrustworthy. A locked-out employee might logically remember a clear statement that she would never return to the place she had worked for 25 years without remembering all of the extraneous details. That Hughes and Duthie attend the same church also makes Duthie's testimony more credible. Duthie would not be likely to fabricate testimony involving a fellow church member; and Hughes would be more likely to tell Duthie candidly what the Board of Directors had planned.

(CP Brief at 100-101.)

The Parties' argument on the issue of the credibility of the two witnesses is scholarly and the approaches advanced are correct for various settings and circumstances. All such recipes however must be leavened by the observation of the witnesses during the process of examination and cross-examination. Only then may the various ingredients of credibility such as motive and memory be weighed and balanced to a proper result. The clarity of the opposed testimony of these two witnesses allowed a close focus on the testimony of each.

I was impressed by Ms. Duthie. The Respondent is correct that she was not able to be specific about dates and detail. I found, however, that she was trying to testify respecting the conversations specifics and, although it was not perfectly imprinted in her memory, the portion respecting Hughes statement that the Board would never allow the locked-out employees to return to work clearly stuck with her. Indeed as the Charging Party notes, such statements are surely memorable to a locked-out employee who wants her job back. I fully credit her testimony respecting this element of her testimony.

Mr. Hughes created in me the impression that he was doing as well as he could to convince all the parties, including himself, that the remarks attributed to him—remarks he doubtless realized would do neither him nor his employer credit—simply did not, indeed could not, have occurred. In my view, this wish contributed to his recitation. I do not credit him his denials over the contrary testimony of Duthie..

D. Analysis and Conclusions

The three complaints allege a wide range of violations of Section 8(a)(1), (3), and (5) of the Act. One element of the 8(a)(5) allegations is that the Respondent's conduct alleged to violate the Act during the period up to and including August 10 converted the Respondent's February 25 lockout of unit employees into an unlawful lockout effective August 10. Counsel for the General Counsel made it clear from the onset of the trial in his opening statement that the government's theory of a violation in this regard included a "totality of the circumstances" argument, i.e., that the entirety of events must be considered to determine if the lockout on

August 10, 2010 was converted from a lawful lockout to an improper lockout which was in violation of Section 8(a)(5) and (3) and (1) of the Act.

I view this factual argument as making it efficacious to first address all other allegations of violations of the Act first before turning to the final question of the lockout's argued conversion to an illegal lockout on August 10. I further find it would also be best to organize the alleged violations in a manner designed to provide an intelligible consideration of the allegations as a whole as follows.

1. Subcontracting

There is no question that the Respondent in early February 2010 subcontracted to outside contractors intensive cleaning of the Club kitchens. The contractor's employees performed their cleaning operations on a once a week basis in the evening. There is also no dispute that the Club did not notify or bargain with the Union respecting the decision to subcontract or its effects on unit employees. However, as previously set forth in greater detail, the past practice respecting unit and contractor employees undertaking of kitchen cleaning is complicated. As noted, I have credited the union witnesses respecting the details of this history.

I find as follows. There has historically been regular daily kitchen cleaning which has been undertaken by unit employees. There has also historically been weekly more intensive cleaning done by unit employees. There is also a third type of kitchen cleaning referred to as deep cleaning which involves cleaning hoods and surfaces with chemical degreasers and associated major cleaning as earlier described. At least prior to 2008 until early 2009, that work had been done by a subcontractor, monthly. The contractor's services were discontinued by the Club in early 2009 and the work was thereafter done by unit employees until February 2010 when a new contractor was selected by the Respondent. The work undertaken was done weekly rather than monthly and to a certain degree was expanded from the work earlier done by the monthly subcontractor to include work heretofore done by the Unit on a weekly basis as earlier described. At no time had the Club discussed with the Union, provided the Union with notice, or provided the Union an opportunity to bargain respecting the decision to reinitiate subcontracting, the extent of the work subcontracted, or the effects of the subcontracting.

The General Counsel is not arguing that the complaint challenges the subcontracting of the deep cleaning done monthly by the previous contractor. See, e.g., the General Counsel's position on brief at 109: "[T]he subcontracting of this "deep" cleaning is not an issue in this case." The bargaining unit's daily kitchen cleaning was not subcontracted and is not an issue. The General Counsel argues, however, that when the contractor who undertook weekly deep cleaning in February 2010 also undertook intermediate kitchen work that had previously done by unit employees weekly, this "weekly" unit work was improperly subcontracted under longstanding Board law. The Respondent argues that there was a longstanding practice of subcontracting the deep cleaning and it was entitled to do it.

Each side cites appropriate case law in support of their respective legal positions, but the key issue is whether or not the work newly subcontracted included work that had not been previously been subcontracted and had been done by the unit employees. Having considered the arguments of the parties, it seems clear to me and I find that the parties do not disagree on the law but rather on the relationship of the work subcontracted in 2010 with the work earlier subcontracted in 2008 and prior. Thus if the work was the same, the Respondent argues its

subcontracting was permitted. The General Counsel. as noted. concedes the deep cleaning under subcontract is not under challenge.

What the General Counsel argues, and the Respondent denies, is that the 2010 subcontracting is significantly broader than the earlier contracting and that the 2010 contracting directly intrudes on the longstanding Unit work that had never been subcontracted. If new "non-deep cleaning" work was lost to the unit for the first time, the defense of past practice that controls the narrower question of deep cleaning does not necessarily apply.

As discussed in the earlier section, unit employees Carlos Hernandez and Francisca Carranza, each of whom I have found knowledgeable and highly credible, testified that the work undertaken by the new contractor was greater than that done by the previous contractor, intruding on unit responsibilities and duties for the first time. Respondent did not effectively contest that factual assertion, and I find it to be so. The Respondent, as to that portion of the contractor's work that replaced that portion of the non-deep cleaning work done by the unit employees, failed to properly notify and provide the Union an opportunity bargain about the decision or the effects of the decision to subcontract that particular work out. As to this work, there was no past practice involved. This is a quite narrow window involving a small portion of work, but it is not de minimus. I find it is clearly cognizable under the Act. *Fibreboard Corp. v. NLRB*, 379 US 203 (1964).

Considering all the above, the post-hearing briefs, the record as a whole, and the demeanor of the witnesses, I find that the Respondent wrongfully subcontracted out the kitchen cleaning work that exceeded the deep cleaning traditionally subcontracted in February 2010 without notifying the Union and providing it an opportunity to bargaining concerning the decision and its effects. Further I find this conduct violates Section 8(a)(5) and (1) of the Act.

2. Rule allegations

a. The no-access rule

In *Tri-County Medical Center*, 222 NLRB 1089 (1976), the Board addressed employer rules that exclude off-duty employees from the employer's property for all purposes. The Board held:

> Such a rule is valid only if it limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity. Finally, except where justified by business reasons, a rule which denies off-duty employees entry to parking lots, gates, and other outside nonworking areas will be found invalid.

Tri-County, 222 NLRB at 1089.

In a very recent case, *Sodexo America LLC*, 358 NLRB No. 79 (July 3, 2012), at page 2 of slip op., the Board returned to the *Tri-County* doctrine:

> […]in *Saint John's Health Center*, 357 NLRB No. 170, slip op. at 3–6 (2011), the Board

> found that a policy barring off-duty employee access to the employer's facility except for employer-sponsored events violated the Act. The Board reasoned that, with this exception, "the Respondent is telling its employees, you may not enter the premises after your shift except when we say you can. Such a rule is not consistent with *Tri-County*." Id. at 5. Similarly, here, the "hospital-related business" exception to the Hospital's no-access policy provides management with the same unfettered discretion to permit off-duty employees to enter its facility "as specifically directed by management." Thus, as in *Saint John's*, because this policy allows the Respondent unlimited discretion to decide when and why employees may access the facility, we find that under *Tri-County*, the Respondent's no-access policy violates Section 8(a)(1) because it "does not uniformly prohibit access to off-duty employees seeking entry to the property for any purpose." Id. at 6.

The Respondent does not deny the existence of the rule, nor is there a dispute about its areas of applicability at the Club facility. Thus Mr. Olson testified:

> Q. My question is whether you have any based on your experience at the club, is there any general understanding of what are member areas?
> A Yes.
> Q. And what are they?
> A. They are -- another term would be called public spaces. But they're areas that the country club members would utilize in their dealing with the club. There's, I think, four access points from parking lots, locker rooms, fitness rooms, several dining rooms, the foyer.

Rather, the Respondent argues on brief [record citations omitted] at 69:

> The Employer's rule is justified because of its legitimate business concerns, specifically that Castlewood is a country club to which its members pay dues in order to relax on its premises. All of the Club's premises are on private property. Accordingly, Castlewood believes that its members should not be harassed or disturbed by the Union or bargaining unit members while visiting the Club. Furthermore, to the extent Castlewood's rule does not limit the prohibition on employee access to internal member areas, Castlewood's rule is justified due to the nature of Castlewood's business. As a country club, Castlewood contains outdoor areas that its members regularly use as part of their experience with the Club – tennis courts, swimming pools, golf courses, etc. Therefore, Castlewood's restriction of employee access to outdoor Club member areas is permitted, and its no-access rule is not overbroad. Furthermore, as discussed above, these rules had been in place for several years without complaint.

Counsel for the General Counsel challenge the broad reach of the Respondent's geographical concerns. They note the Respondent's argument that wherever the Club's members and guests might venture on the Club's grounds it is legitimate to protect them from harassment is far too broad, citing *NLRB v. Ohio Masonic Home*, 892 F.2d 449 (6th Cir. 1989), enfg. 290 NLRB 1011 (1988). Moreover, they argue that the rule does not restrict harassment but rather broadly prohibits the unauthorized presence of the employees.

The Charging Party argues on brief at 105:

> The Board has specifically held that off-duty employees may distribute leaflets to customers in a hotel's porte cochere, even though employees work in that location:
>
> > [T]he occurrence of nonproduction work activity on part of an employer's property does not, by itself, allow an employer to declare its entire property a—working area for the purpose of excluding employee solicitation activity. Here, the main function of the Respondent's hotel-casino is to lodge people and permit them to gamble. The "work activity" which the Respondent asserts occurs at the hand billed entrances outside its hotel-casino—including security, maintenance, and gardening—is incidental to this main function.
>
> *Santa Fe Hotel & Casino*, 331 NLRB 723, 723 (2000).

It goes on to argues on brief at 106:

> The Board has rejected similar attempts to place nonwork areas off-limits to Section 7 activities by deeming them "guest areas" or "public areas." *Flamingo Hilton-Laughlin*, 330 NLRB at 289 (holding that a rule forbidding employees from "soliciting in gaming, meeting, convention, exhibit or recreational areas open to guests and/or public" is illegal); *Dunes Hotel*, 284 NLRB at 876-78 (1987). The Club may not limit access to all "member areas."

Considering all the above, the post-hearing briefs, and the record as a whole, I find that the Respondent's rule extends beyond its legitimate right of restriction under the cases cited. Accordingly, I find that its maintenance violates Section 8(a)(1) of the Act. See *Tri-County*, 222 NLRB at 1089. The Respondent may take no shelter in its assertion that the grounds are private property. The Board's rules limiting an employer's rights to restrict employee access do not turn on property ownership. To the extent the Respondent argues that the rules are longstanding and were acquiesced in by the Union for an extensive period, neither argument is persuasive. Rules which violate the Act are continuing violations so that the rule violates the Act anytime it was extant within the statutory limitations period established in Section 10(b) of the Act. Further, waiver of employee or union rights to be free from an invalid rule may not be found based on a labor organization's simple silent acquiescence.

b. The no-distribution rule

There is no dispute that the Club's employee handbook also restricts distribution of literature Rather than deny the rule's existence, the Respondent argues on brief at 70 (citations to the record omitted).

> With respect to Castlewood's no-distribution rule, the NLRB has generally allowed employers to forbid distribution of literature by employees both during working time and in working areas. *Stoddard-Quirk Mfg. Co.*, [138 NLRB 615] (1962). Castlewood's no distribution rule patently limits its prohibition of distribution to that which is done during working time, and in working areas. Castlewood further prohibits distribution in the "member areas" described above – however, these are areas to which employees are not permitted access. It goes without saying that if employees are permissibly denied access

> to an area, they could not physically be there to distribute literature. Therefore, Castlewood's no distribution rule is not overbroad.

The General Counsel relies on *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945), which sets forth a balancing scheme weighing the Section 7 rights of employees against the management and disciplinary interests of the employer. The Court held that employer rules which ban solicitation in non-work areas during non-work time are: "an unreasonable impediment to self organization . . . in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline. *Republic Aviation*, 324 U.S. at 803.

The analysis of the breadth of the instant rule essentially follows that of the no-access rule. The limitation area is too extensive and fails for the same reasons as the no-access rule. The Charging Party adds the following argument on brief at 107:

> To the extent that the "member areas" ban is intended to prevent employees from communicating with Club members, the rule is also unlawful. Employees have a Section 7 right to communicate with their employer's customers about their working conditions. *Handicabs, Inc*., 318 NLRB 890, 896 (1995) *enf'd* 95 F.3d 681 (8th Cir. 1996) (handbook rule forbidding discussion of "complaints or problems about the company with our clients"); *Compuware Corp.*, 320 NLRB 101, 103 (1995) *enf'd* 134 F.3d 1285, 1291 (6th Cir. 1998) (rule forbidding employee complaints to clients); *Kinder-Care Learning Centers*, 299 NLRB 1171, 1171-[1172 fn. 7](1990) (rule forbidding day care employees to make work-related complaints to parents).

Considering all the above, the post-hearing briefs, and the record as a whole, I find that the Respondent's rule extends beyond its legitimate right of restriction under the cases cited. Accordingly, I find its maintenance violates Section 8(a)(1) of the Act. As found respecting the no-access rule, the Respondent may take no shelter in its assertion that the Club grounds are private property.

c. The early January 2010 timeclock posted memorandum to employees

There is no dispute that the Respondent in or about early January 2010 posted a memo to employees by the employee time clock that reiterated the no-access and no-distribution rules. Since the memo publishes rules found to violate the Act, the publication constitutes a further violation under the legal analysis earlier presented. Especially, where as here, the rules are being directed to chill employees protected activities. As the Respondent argues on brief at 70, "Even if the General Counsel can prove that the Employer's rules were overbroad and that Mr. Hunt did impermissibly threaten an employee, neither the Union nor any employees suffered any harm." As the Charging Party notes on brief at 107, however, "No evidence of enforcement is required. *Double Eagle Hotel & Casino*, 341 NLRB 112, 116 fn. 14 (2004), enfd. as modified on other grounds 414 F.3d 1249 (10th Cir. 2005)."

Considering all the above, the posthearing briefs, and the record as a whole, I find that the Respondent's memorandum republishing the rules earlier found violative of the Act constitutes an additional violation of Section 8(a)(1) the Act. Indeed the fact that the rules were directed to employees in the context of anticipated protected concerted and union activities lends

additional support to the earlier findings that the maintenance of the two rules was in each case a violation of the Act.

3. The Thomas Hunt allegation

In a prior section of this decision, I considered the testimony of witnesses Ms. Sara Norr and Ms. Petra Medina and, crediting each, found that Mr. Hunt, an admitted manager and agent of the Respondent, approached Medina hand billing in front of the main clubhouse and said to her, in Norr's presence, that she needed to leave or he would give her a warning.

The Respondent took the following position on the factual issue on brief at 68 (citations to the transcript omitted):

> The General Counsel has offered evidence that Mr. Hunt threatened to give an employee a warning for violating the Club's rules. While Mr. Hunt was unavailable to testify, the Club takes the position that Mr. Hunt's alleged threat to give this employee a warning was not a threat within the meaning of Section 8(a)(1), as no discipline was administered, and this employee continued to engage in protest activity going forward.

The General Counsel argues on brief at 115, record citations omitted:

> When Clubhouse Manager Hunt approached employee Medina in the process of leafleting, he told her she had to leave, despite her being in a nonwork area. Hunt's order, in and of itself is a violation because he was prohibiting Medina in the exercise of her Section 7 rights. Moreover, when Clubhouse Manager Hunt threatened employee Medina with a warning, he was threatening her with discipline under two unlawfully overly broad rules. Under these circumstances Respondent, through Hunt, violated Section 8(a)(1) of the Act. Respondent will likely argue that Medina's subsequent presence at other Union demonstrations is evidence that Medina did not view Hunt's statements as a threat. However, Medina did leave on this specific occasion out of fear of retribution and her subsequent willingness to risk discipline does not remove the threatening nature of Hunt's statements.

The Charging Party notes on brief at 110:

> The Board requires an "unequivocal admission of unlawful conduct" to escape a remedial order. *Ark Las Vegas Restaurant Corp*., 335 NLRB 1284, 1289 (2001), enfd. in rel. part 334 F.3d 99 (D.C. Cir. 2003); *Astro Printing Services*, 300 NLRB 1028, 1029 (1990); *Holly Farms Corp.*, 311 NLRB 273, 274 (1993).

Considering all the above, the posthearing briefs, and the record as a whole, including my evaluation of the credibility and demeanor of the witnesses set forth supra, I find that the Respondent's manager Hunt wrongfully threatened a handbilling employee because she was handbilling in a nonwork area and in application of employer rules which were found violative of the Act, supra. As I find, such conduct constitutes a violation of Section 8(a)(1) the Act.

The Respondent's argument that no discipline was in fact administered is rejected. A threat need not be fulfilled to become a violation of the Act. And the threat in the instant

circumstances did in fact chill employee Section 7 activity in that it caused the employee to cease her protected handbilling and leave the area. Further the Respondent's argument that the employee continued subsequently to engage in protective activities is ineffective. Again the threat need not be effective in stopping protective activity to be a violative threat. Protected employee activities may be chilled without being frozen, reduced without being ended. These defenses therefore fail.

4. The John Hughes allegation

In a previous section, I considered the evidence respecting this allegation. Essentially two versions of event were testified to by the participants, Ms. Duthie and Mr. Hughes. Ms. Duthie is a 25-year employee of the Club; Mr. Hughes is the golf professional, the head of the golf portion of the Club, and a manager and supervisor. I credited Ms. Duthie's version of events over that of Mr. Hughes. I find therefore that Hughes, a supervisor of the Respondent at relevant times, informed Duthie that the club board of directors would never allow the locked-out employees to return to work.

The Respondent argues that irrespective of what Hughes may have said to Duthie, and irrespective of his admitted status as an agent and supervisor of the Club at relevant times, Duthie had no reason at the time of the conversation to believe Hughes was an authority figure. I reject this argument on its facts. In considering the testimony of Duthie as a whole, it is true that she did not have a facile understanding of the Respondent's organizational chart. Nonetheless, as a long time employee who regularly served food to members and managers and Board of Director members, she undoubtedly knew that Hughes had a managerial responsibility for the golf end of the Club's operations. Further, she knew from direct observation that he attended annual officer-election meetings and other meetings attended by officials of the Club.

The Respondent further argues that Hughes could not have known the board of director's intentions with respect to taking back the locked-out employees. He was not a board member, testified he had not had discussions with the board about such matters and Duthie would have had no basis for a contrary expectation. Thus, argues the Respondent, it is not credible that Hughes could be a source of information about Board intentions. I again reject this defense on its facts. Mr. Hughes was the golfing manager, former general manager, and a longtime club manager. He attended social gatherings, spent time on the golf course, and went to meetings which were frequented by managers and Board officials. In this situation, Mr. Hughes need not have had specific discussions with individual Board members to obtain knowledge or surmise respecting club board intentions.[19] Moreover, Duthie, observing Hughes during her work for many years, could reasonably conclude that, if Hughes confidentially gave her information respecting the intentions of the Board, the information could well be true.

Further the information Hughes imparted to Duthie was not self-evidently opinion or speculation. I found Hughes told Duthie "Well, I hate to tell you this, Peggy, but the board of directors has said you folks are never ever coming back to work here." The statement made

[19] The Respondent is a country club and golf course catering to its member owners. Board members are members and at least some of them play golf. The club golf manager would be expected by a long- term employee to communicate with board members. I so find.

asserts that the Board of Directors "said", i.e., a statement of fact, "[Y]ou folks are never ever coming back to work here." He reported a statement by Club officials and did not give his own opinion of what the Board would do nor speculate on the question.

The Respondent advances various Board cases holding that supervisors who did not supervise employees whom they threaten are unable to consummate their threats and therefore the threats are self-evidently impotent and non-coercive. These cases are not applicable to the instant allegation because Hughes is reporting the intentions of the Board of Directors respecting the locked-out employees—a matter well within the Club's Board's control.

The General Counsel argues on brief at 104:

> In *Hausner Hard-Chrome of KY, Inc.*, 326 NLRB 426 (1998), the Board found that the statements of three department heads were 8(a)(1) violations and could be attributed to the employer because these department heads were agents under Section 2(13) of the Act. The Board in that case had first discarded the administrative law judge's finding that the department heads were supervisors under the Act. *Id*. at 427. Then the Board turned to an agency analysis by applying the test of "whether, under all the circumstances, employees 'would reasonably believe that the employee in question [the alleged agent] was reflecting company policy and speaking and acting for management.'" *Id*. at 428. quoting *Southern Bag Corp.*, 315 NLRB 725 (1994). The Board further stated that "an employer may have an employee's statements attributed to it if the employee is 'held out as a conduit for transmitting information [from management] to other employees." Id. (quoting *Debber Electric*, 313 NLRB 1094, 1095 fn. 6 (1994)).

All the above being so, the credited statement must be tested under normal Board standards for violations of Section 8(a)(1) of the Act. No party contends to the contrary, nor could they under longstanding black letter law, that a threat by an employer's board of directors to locked-out employees that they "were never coming back to work here," violates Section 8(a)(1) of the Act. Having found Duthie could reasonably believe that Hughes' information as related to her in the credited version of the conversation was true, I further find the statement was chargeable to the Respondent and that it thereby violated Section 8(a)(1) of the Act.

5. The Jerry Olson allegation

At the December 7, 2009 bargaining session attended by the then Respondent counsel Murphy and Olson for the Respondent, and Huber, Norr, and various employees for the Union, an exchange occurred between Huber and Olson. Ms. Huber testified:

> And I said, well, there's still a lot of issues outstanding. And then Jerry [Olson] said that -- he said, "I don't know what the legal definition of impasse is, but I think, you know, we're there. And we're just wasting time over these issues, maybe it's time for employees to strike or quit."

The Union's bargaining notes have the following entry at this point in the bargaining session:

> Jerry [Olson]: no one disputes that. The issue is that we have incompatible philosophies on healthcare. We can't accept your proposal and you can't accept ours. I don't know what

the definition of impasse is, but there's no point arguing about the same things. Maybe it's time for the employees to strike or quit.

Mr. Murphy testified:

> At some point, during that meeting, and I -- Ms. Huber had made a comment to the effect that the Club, Castlewood, was leaving the employees without any options. And Mr. Olson referred to that and said, to the effect, you said earlier that the employees don't have any options, but they have a lot of options: They can always quit and go look for another job; this might be time for them to go on strike, if that's how they feel about the Club's position, to get to resolution of this. He referred to the -- that Ms. Huber had said, at a number of times throughout the bargaining, that employees also – and said that, the same they had no options, was inconsistent with what she had said at a number of points throughout bargaining. At those points during bargaining. Ms. Huber had referred to employment at other places such as the airport or even at Denny's Restaurants that provided employees with what Ms. Huber was saying, in her view, were better compensation and benefits' alternatives than what the Club was proposing; and that with Ms. Huber having said all those things, for Ms. Huber to say that the employees had no options just was even consistent with what -- how she had described the situation herself.

Mr. Olson testified:

> Q. [W]hat you said to Ms. Huber when she talked about backing employees into the corner and they're having options?
> A. I said, "Wei-Ling [Huber], that's not a true statement. They do have options. They can quit, go to other jobs. Or they can go on strike or they can accept our proposal, but there are options."

The General Counsel argues that an employer who suggests an employee should quit is making an implied threat which, violates Section 8(a)(1) of the Act. It cites *Stoody Co.*, 312 NLRB 1175 (1993), and *Equipment Trucking Co.*, 336 NLRB 277 (2001). In the former, an employee told the employer's personnel manager

> [A]bout the loss of sick days, pay cuts in fabrication, and [the employees] lack of input in the setting of rules and regulations, which they felt were being dictated to them. The [personnel manager] responded, ''If we were going to be so nitpicking, maybe this wasn't the place for us.''

Stoody, 312 NLRB at 1177.

The judge found with Board approval that the assertion of the personnel manager violated Section 8(a)(1) of the Act. The judge reasoned:

> Such statements convey the message that complaints about working conditions and continued employment are incompatible and implicitly threaten discharge to those who would voice them. *Fontaine Body & Hoist*, [302 NLRB 863] at 866; *House Calls, Inc*., 304 NLRB 311 (1991); *Rolligon Corp*., 254 NLRB 22 (1981).

Id. at 1181. Similarly, the Board in *Equipment Trucking* found an implied threat where the employer's vice president told an employee that the Respondent's president would run the Company "any way she wanted, and if [he] didn't like it, find another job." *Equipment Trucking*, 336 NLRB at 277.

The Charging Party emphasizes the fact that the Union's notes and Huber's testimony are consistent and that Huber demonstrated a sure grasp of the events. The different context of the remarks about quitting advanced by the Respondent, the Charging Party agues, is not logical nor are the versions of Olson and Murphy consistent in their details.

I reach the following conclusions. First, as discussed supra, I have found the notes Ms. Norr kept on behalf of the Union to be far more complete and reliable than the other notes before me. Considering the arguments of the parties and the testimony addressing the remarks and the context in which they were made, I credit the Union's notes and Huber's testimony over the differing version of events of Olson and Murphy. Olson and Murphy did not have a complete recall of bargaining, and the Respondent's version of events is difficult to square with the event as recited by the Union notes, which I find highly reliable. I find the events occurred as the notes and Huber indicate and discredit Murphy and Olson where their versions differ.

Given this factual finding, I further find that the Respondent made an impermissible implied threat when it suggested that the employees should choose between options like accepting the Respondent's bargaining proposals or striking. The Respondent's proposed choice matches the euphemistic saying "my way or the highway" and suggests that continued employment and submitting counterproposals are incompatible. Thus, it implicitly threatens discharge to those who would voice them. I therefore find the statement violates Section 8(a)(1) of the Act.

6. Bad-faith bargaining allegations

a. A basic overview of the events and issues

I have set forth in some detail the bargaining evidence in an earlier section of this decision.[20] I will repeat neither that detailed evidence nor my findings concerning the credibility of the notes and testimony respecting the August 10, 2010 bargaining.

In essence, the bargaining for a new contract between the parties had two stages. The first, beginning with the onset of the negotiations, involved the Respondent's counsel Murphy as its bargaining spokesman. The parties reached various tentative agreements on elements of a new contract, but the critical element of healthcare coverage remained fundamentally unresolved. The Respondent made a final offer to the Union at the end of 2009, which the Union did not accept. The Respondent locked-out the unit employees on February 25, 2010. A decertification petition was filed, and an election was held on April 2, 2010 with a vote of 44 for the Union and 17

[20] In that earlier discussion I also considered the parties arguments concerning evidence of the August 10, 2010 bargaining and made findings respecting the proper weight to be ascribed to certain documentary evidence and testimony dealing with that session. I found certain documents and testimony less credible than other such evidence and testimony.

opposed. The Board issued a certification on July 14, 2010. At the April 27, 2010, bargaining session, the Club introduced a new union security proposal, quoted in full, supra.

At the end of spring and into the beginning of summer 2010—with the lockout continuing, temporary employees being utilized by the Club, and no resolution of the contract differences in sight—the Respondent undertook an internal review of its bargaining. It retained a new law firm and labor counsel to lead negotiations, club counsel Hulteng, who met with his client and attended his first bargaining session on July 14, 2010. In my view ,this switch marks the start of the second half of bargaining.

Counsel Hulteng at the bargaining session of July 14, 2010 introduced himself to the union bargainers, announced a new evaluation and assessment of the bargaining process from the Club's side, adjudged the effort of the Union to exert pressure on the Club to have essentially failed, and indicated that he expected to size up the situation with the Club's board of directors and move forward in the next bargaining session.

At the start of the next session held on August 10, 2010, the Club made a variety of new or modified contract proposals. The actions of the Club were not well received by the Union. While bargaining took place after that date, no resolution of the dispute occurred; to the time of the hearings herein, the lockout has continued.

The General Counsel argues that the Respondent's actions on August 10, in the totality of circumstances, constituted bad-faith bargaining in violation of Section 8(a)(5) and (1) of the Act. Importantly, the General Counsel also alleges that the Respondent's wrongful conduct on August 10, 2010 converted the then ongoing lockout to an unlawful lockout effective August10, 2010.

It is appropriate to consider first the issue of whether or not the Respondent's bargaining on August 10, 2010 was in bad faith and then only if necessary, separately consider whether or not the lockout was converted to an illegal lockout.

b. The Context of Respondent's bargaining in the Session on August 10

At the threshold, it is relevant to keep in mind that the other violations of the Act I have considered are relevant to deciding th bargaining issue. It must be kept in mind when that conduct occurred, i.e., whether it took place before or after August 10, 2010. Beyond the sustained allegations, supra, there have been no findings that the Respondent violated the Act before August 10, 2010. Thus, no contention or findings have been made that the Respondent's conduct in bargaining for a new contract up to August 10, 2010 was in bad faith. Its conduct during this period includes the lock out of unit employees on February 25, 2010 and the subsequent maintenance of that lockout until August 10, 2010. However, as described in detail, supra, the Respondent at some point clearly undertook a reappraisal of its bargaining stance. It received feedback from its members and the board of directors. It changed labor law firms and retained a new head bargainer from the new firm. It had discussions with its new counsel respecting how to proceed.

Hulteng, in his new role as the Club's chief bargainer, alluded to this reappraisal in his initial bargaining session as chief negotiator on July 14. He sought feedback from the Union as the Union's credited notes reflect:

> I'm happy to be here and have had a chance to talk a little about this to the Board. I can probably benefit from some insights from your side as to what you see as the stumbling blocks. I've got a sense. of the main issues. There's a lot of water under the bridge. I'm hoping as a result of today's meeting that I'll be able to get a feel and be able to talk to the board about where we can go.

At meeting's end however, Hulteng recurred to his opinion that bargaining matters had been reevaluated on the Respondent's side:

> Time and leadership changes can affect positions. If a deal's available, we should do it now or soon. If neither side can justify sufficient change in position to get a deal, that's what I meant' by point of no return. We'll have to decide if it makes sense to just keep flogging away. I don't know how our side will size all that up, but I should be able to speak to that at our next meeting. I need to meet with board and review issues raised, then we should come back. Talk: re dates in the next couple days.

c. The bargaining session on August 10 new or amended Club proposals

The August 10, 2010 bargaining session opened with the Respondent submitting a written document entitled: Revised Final Employer Proposals. A portion of the proposals are here noted and compared with the previous Club proposal to this point in the bargaining.

(1) Union Shop: retitled, "Maintenance of Membership and Hiring"

The Respondent's proposal dealing with union security was formerly titled Union Shop and retitled "Maintenance of Membership. " Under the proposal Union members would be required to maintain membership and pay dues and initiation fees to the Union. Employees not union members at the time the contract went into effect and new hires thereafter would neither have to join the Union nor pay dues or initiation fees.

Before the lockout the parties had tentatively agreed upon a standard union-security clause requiring unit employee membership in the Union. On April 27, 2010, an amended club proposal was submitted to the Union as section 2:

> (a) All employees covered by this Agreement shall, on the thirty-first (31st) day after their employment, or the date of this Agreement, whichever is the later, become members of the Union and retain such membership during the period of this Agreement as a condition of their employment; provided, however, that for employees currently employed as of the date this Agreement becomes effective, the parties shall operate on an agency shop basis.
>
> (b) Upon written notification from the Union that an employee has failed to become or remain a member of the Union in good standing as provided herein, the Employer agrees to terminate said employee within seven (7) days from such notice; provided, however,

> that this shall not apply to such employees who have timely elected not to remain members of the Union under section (a) and its agency shop approach.
>
> c) During the employment of any person while such person is not a member of the Union, the Employer shall pay said person so employed at the regular Union wage provided for in this Agreement for the class of work said person is doing, and shall in all other respects require said person to work under, and live up to, all Union rules and regulations covering said employment, as set forth in the Agreement; provided, however, that this shall only apply to such employees who have timely elected not to remain members of the Union under section (a) consistent with principles of an agency shop approach.

The expired contract's union security clause provided unit employees were obligated to join the Union and pay dues and initiation fees.

(2) Seniority

The Respondent's proposal dealing with seniority provides that the Club could make decisions on layoffs based not solely on seniority, but also based on consideration of work performance.

The previous Club proposal was tentatively agreed upon before the lockout and allows with specific limits the use of factors other than seniority.

The expired contract's seniority language provided that layoffs would be determined by seniority within classifications. Murphy characterized the agreement as follows in a December 23, 2009 email covering the then Club final offer:

> This revised Seniority provision includes the agreed-upon terms in subsection (b) for a new seniority approach for certain shifts and departments, along with the remaining seniority provisions outlined in the Union's last 12/7/09 proposal.

(3) Subcontracting

The Respondent's subcontracting proposal provides for subcontracting of unit work without limit following 30 days notice to the Union and provision of an opportunity for the Union to meet and confer regarding the subcontracting and its effects, if any, on bargaining unit employees. In contrast, the expired contract language respecting subcontracting at section 17 states in part:

> The Employer has, and shall retain, the full right of management and the direction of its business and operations. Such rights of management include. among other things, but are not limited to:
>
> * * * *
>
> (2) to subcontract work, to introduce new methods, techniques and/or equipment (provided that such subcontracting shall not apply to the classifications covered by this Agreement, except insofar as incidental work for which subcontractors regularly are employed, such as carpet cleaning, window washing, marble floor cleaning, dry

> cleaning, or for subcontractors or other employees performing renovation work to restore the Employer's facilities is involved) . . . .

The Respondent's April 27, 2010 proposal to the Union provided:

> The Employer has, and shall retain, the full right of management and the direction of its business and operations. Such rights of management include, among other things, but are not limited to:
>
> * * * *
>
> (2) to subcontract work, to introduce new methods, techniques and/or equipment (provided that such subcontracting shall not apply to the classifications covered by this Agreement, except insofar as incidental work for which subcontractors regularly are employed, such as carpet cleaning, window washing, marble floor cleaning, dry cleaning, or for subcontractors or other employees performing renovation work to restore the Employer's facilities is involved, or for kitchen cleaning work of any type, or for laundry work of any type) . . . .

d. The basic law of bad-faith bargaining and the arguments of the Parties

The Board in *Public Service Co. of Oklahoma*, 334 NLRB 487 (2001), enfd. 318 F.3d 1173 (10th Cir. 2003), described its analytical framework for addressing bad-faith bargaining cases:

> Section 8(d) of the Act defines the duty to bargain collectively as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession." Good-faith bargaining "presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract." *NLRB v. Insurance Agents' Union*, 361 U.S. 477, 485 (1960).
>
> In determining whether a party has violated its statutory duty to bargain in good faith, the Board examines the totality of the party's conduct, both at and away from the bargaining table. See, e.g., *Overnite Transportation Co.*, 296 NLRB 669, 671 (1989), enfd. 938 F.2d 815 (7th Cir. 1991); *Atlanta Hilton & Tower,* 271 NLRB 1600, 1603 (1984). From the context of an employer's total conduct, it must be decided whether the employer is engaging in hard but lawful bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement. *Id*. Although the Board does not evaluate whether particular proposals are acceptable or unacceptable, the Board will examine proposals when appropriate and consider whether, on the basis of objective factors, bargaining demands constitute evidence of bad-faith bargaining. *Reichhold Chemicals*, 288 NLRB 69 (1988), affd. in relevant part 906 F.2d 719 (D.C. Cir. 1990), cert. denied 498 U.S. 1053 (1991).

Public Service, 334 NLRB at 487.

The Board's teaching in this and many other cases with court approval is that resolution of bad-faith bargaining allegations are fact intensive and require consideration and analysis of the totality of facts and circumstances at the table and away, to determine the issue of good faith.

While many individual actions at and away from the bargaining table are all susceptible to separate evaluation and analysis, it is the totality of circumstances that must be considered to determine the good faith of the bargaining.

The parties in the instant case have filed learned and substantial post hearing briefs on the question at issue here. The General Counsel and the Charging Party argue, in effect, that the Respondent underwent a sea change in its relationship with the Union as the lockout wore on at the end of spring 2010. Thus, they argue that, following an internal evaluation which included receipt of numerous and strong antiunion sentiments and recommendations from club membership and former club officialdom, the club policy makers resolved to cease attempting to reach agreement with the Union on a new contract. Instead, they decided to seek means of being rid of this troublesome union. In relatively short order they argue, a new labor firm and labor and negotiating counsel were retained and instructed. New counsel met initially in an essentially introductory meeting with the union bargainers: forewarning the Union's negotiators that tougher times lay ahead and that the Union's leverage had passed. Hulteng promised to make new proposals at the next bargaining session. At that next session, August 10, 2010, the Club's new chief spokesman opened with a sweeping proposal rejecting much of what had been tentatively agreed to up to this point in bargaining. He proposed in the prior agreement's stead regressive contract language ending compulsory union dues, the Union's statutory right to bargaining about subcontracting of unit work, and modification of previously agreed upon controlling weight of seniority in aspects of employment decisions.

The Respondent's motivation for this change in conduct, argue the General Counsel and the Charging Party, was no longer to seek an agreement on the terms of a new contract but rather to eliminate or fatally weaken the Union and the locked-out employees. The Respondent hoped to do this, they argue, by reducing the value to employees of any possible new contract and, more importantly, paving the way for merging the probably declining ranks of locked-out employees with the temporary employees then working at the Club who were in the Club's view in a way that favored the latter group. As evidence, the General Counsel and the Charging Party argue that the Respondent in its seniority proposal and the discussion of it at the bargaining table on August 10, 2010 revealed that it intended to acquire the contractual right to select whom it wished to be employed in the post-lockout period by choosing from both the temporary employees and returning locked-out employees. This proposal, viewed in light of the explanation Respondent gave, was inherently destructive of the rights of the locked-out employees to return to work rather than be wrongfully displaced by temporary employees and constitutes a per se violation of Section 8(a)(5), (3) and (1) of the Act.

The General Counsel and the Charging Party seek to cement and sustain their allegations of bad-faith bargaining by advancing the Respondent's position on August 10. Specifically, they point to the Respondent's refusal to agree to frequent bargaining meeting unless the Union made substantial movement, i.e., concessions which would bring them closer to the Respondent's new positions on the terms of the contract.

As might be expected, the Respondent disagrees. Thus, the Respondent on brief emphasizes that its proposals on August 10, 2010 were not individually nor collectively violative of the Act or supportive of a finding that it was acting in bad faith. Rather the Respondent argues the proposals were based on proper evaluation of the situation presented at that time and were entirely motivated by a desire to reach agreement.

In significant part, the Respondent, in defending its new proposals on union security, relies on the fact that employees sought a vote on the Respondent's last offer, a matter the Union would not countenance and which refusal prompted employee disagreement leading to a decertification petition and election. As such, it argues, its union security proposals were designed to avoid employee conflict after the lockout ended.

The Respondent urges the fact that club membership and club management had learned by observing the temporary employees working during the lockout that there was a wide variance in the quality and service of its employees as justification and support for its proposal that pure seniority was an insufficient basis for making decisions among unit employees. The Respondent further argues that it did not in fact condition or delay bargaining on Union concessions, and if it had done so, such conduct would have been consistent with the earlier bargaining conduct of the Union.

At this point, it is well to turn in detail to the individual bargaining subjects in contention

(1) Seniority and the locked-out employees' return at the lockout's end

During the August 10, 2010 negotiations, Respondent's counsel Hulteng, in presenting the new proposals, repeatedly indicated they were the result of the club membership's general disapproval of the conduct of the locked-out employees as communicated to the board. He also indicated that the club membership and the club board had determined that the temporary employees' service to the members during the lockout was simply superior to the service of the unit employees before the lockout and that the Club's operation could continue with those temporary employees. These experiences had led to a hardened position and the new proposals.

The Union's notes of a portion of this discussion on August 10 provide:

> RH: you're not misreading that there's a firmness of position. At first I wasn't sure where they were coming from. I get a sense that the experience during the lockout has not led the membership to feel that their economic proposals should be modified, and has led to reflection on some of these other topics.
> MC: the fact that the proposal is now worse than the previous one says to me - and this is not a board charge they probably understand, and you definitely do based on your experience you must know this is getting us further from settlement, not closer. Seniority, subcontracting, open shop - these are core issues that no self-respecting union would agree to. 'There is no desire to move closer. The clear message is, you can come back to work and it will be worse than when we locked you out.
> RH: the one thing I sensed from the beginning is that . I wasn't sure where the union felt their leverage was at this point. Both sides have taken shots and we can't undo history. Then people re-assess based on their experience. You've decided to pursue this because you believe your proposal is in your members' interests. Our people look at the situation and draw conclusions. There was a decertification election and it was relatively close. There are divided views within your group and we won't close our eyes to it Our assessment is that the union doesn't have a lot of leverage at this point The experience of the lockout hasn't been pleasant, but we think we've benefited in terms of service and quality, and nothing about it has caused us to think. the economics were unjustified on

the club's part. I come in this late in the game, but it's one of those situations -labor disputes can go different ways. Things can change, you could convince us, but we're giving an honest assessment of where we're at.

MC: clearly there is no desire to end the dispute.

RH: we want to end it on this basis. (pointing to Club contract proposal)

MC: but you know that's impossible.

RH: I don't think you have any leverage, so if I were you, I'd try to resolve it on terms acceptable to the club.

WL: on the eve of the lockout we were lk apart, and the day after we were 5k apart. I believe it has cost the club more than 5k per month. This info request is about figuring out how to have both a clean club, good service, and no loss.
RH: the tactics the union has used have, rather than winning members over, have convinced them that your interests are not theirs.

With regard to the seniority language, the general subject had been discussed in earlier negotiations under the Club's former counsel. The discussion on August 10 noted above, however, made the Union realize that the temporary employees were viewed as superior by some club members, club managers, and club board members. The Union was concerned about the consequences of this opinion. This Union suspicion was reflected by the following exchange in the negotiations on August 10.

MC: if we were to accept the terms of the agreement, I take it you would keep your replacements.

RH: if you want to settle, we'll talk about it

MC: we want to know your position because your language allows you to have new

workers take work from old workers,

JO: we'd need to know who is and isn't coming back, so it's hard to answer that questions.

RH: it's the thing that comes up when you're trying to settle a dispute. Nothing in this proposal says anything about that

MC: except the seniority language.

RH: it just says seniority's not the end-all and be-all. If the lockout ends, we'd want to bargain over who's coming back and in what positions?

MC: so are there some who you would not contemplate letting them come back to work. If they wanted to?

> RH: we haven't given it much thought. We are proposing that other factors besides seniority should be taken into account, and would probably take the same position on workers returning from lockout.

It is clear from this exchange that the Union understood, or at least believed that it understood, that the Respondent sought or would later seek the right to exercise discretion in the selection of its post-lockout employee complement by obtaining the right to selection of the new labor force from both the locked-out employees and the then current force of temporary. The August 10, 2010 exchange is unambiguous:

> MC: so are there some who you would not contemplate letting them come back to work. If they wanted to?
> RH: we haven't given it much thought. We are proposing that other factors besides seniority should be taken into account, and would probably take the same position on workers returning from lockout.

The Respondent's economic lockout at its inception is not under challenge by the General Counsel; the same is true of the Respondent's replacement of the locked-out employees with temporary replacements. The Board law in these regards is clear. In *Harter Equipment, Inc.*, 280 NLRB 597 (1986), petition for review denied 829 F.2d 458 (3d Cir. 1987), the Board held that an employer has the right to hire temporary employees after lawfully locking out permanent employees in order to bring economic pressure to bear in support of its bargaining position. The Board further held that, absent specific proof of antiunion animus, an employer does not violate Section 8(a)(3) and (1) of the Act by hiring temporary replacements in order to engage in business operations during a lawful lockout. Id. at 600. In reaching this conclusion, the Board found that the employer's use of temporary employees had ''only a comparatively slight adverse effect on protected employee rights.'' Id.

In *Eads Transfer, Inc.*, 304 NLRB 711 (1991), enfd. 989 F.2d 373 (9th Cir. 1993), the Board further held:

> [A]n employer can only justify its failure to reinstate economic strikers ''for legitimate and substantial business reasons'' based on a ''lockout'' by its timely announcement to the strikers that it is locking them out in support of its bargaining position. For only after the employer has informed the strikers of the lockout can the strikers knowingly reevaluate their position and decide whether to accept the employer's terms and end the strike or to take other appropriate action. In the absence of notification, we conclude that an employer's failure to reinstate economic strikers based on a claimed lockout on their unconditional offer to return to work is inherently destructive of employee rights under *Laidlaw* and is a violation of Section 8(a)(3) and 8(a)(1) of the Act.

Eads, 304 NLRB at 712.

In general, an employer during such a lockout may not engage in conduct inconsistent with its economic lockout. Thus the Board found in *Ancor Concepts*, 323 NLRB 742 (1997), *enfd.*, 166 F.3d 55 (2d Cir. 1999), that the employer engaged in such improper conduct when it told the union that its replacement workers were permanent employees permanently replacing the other employees. Such conduct, the Board ruled, is inconsistent with lawful lockout undertaken

in support of its good faith economic bargaining position and such conduct ends the lawful status of the lockout.[21]

he General Counsel and the Charging Party argue that the Respondent's statement that it would or even that it "probably" would seek at the end of the lockout to employ some of the locked-out employees and some of the temporary employees, selecting from the two groups on a basis other than locked-out employees first, is a threat to the locked-out employees primary right to return to work at the end of the lockout ahead of all others. Hence, it matches the facts discussed in *Eads* and is therefore inconsistent with the advancement of Respondent's legitimate bargaining position. Such a statement denies the locked-out employees their ability to "knowingly reevaluate their position." In *Ancor Concepts*, the employees could not intelligently evaluate their position because the Respondent indicated to them in bargaining (incorrectly in law) that there was a chance they would remain replaced even if they yielded to the Respondent's bargaining demands.

The Respondent argues strenuously that the impressions received by the Union bargainers on August 10, 2010 about the ability of strikers to return (an impression also reflected in numerous emails between the Union and the Respondent between the August 10 session and the following bargaining sessions and in further questions and explanations at and between later bargaining sessions) were specifically denied and corrected in those later sessions and email exchanges by the Respondent. But the test here is what happened on August 10, 2010 not to what extent the Union's reasonable fears and suspicions may or may not have stood corrected in later bargaining sessions or in email communications also well later in time.

The Charging Party argues on brief at 97:

> [T]he Club waited too long to change its bargaining position. In the context of a lockout, the employer has a duty to make its bargaining position clear without delay. *Dayton Newspapers*, 339 NLRB 650, 656 (2003), enf'd in rel. part 402 F.3d 651 (6th Cir. 2005) (holding that a delay of "several months" in employer making its bargaining position clear was too long and that the delay made the lockout illegal); *Alden Leeds*, *Inc.*, 357 NLRB No. 20, at slip op. 12 (2012) (delay of one week is too long).

The General Counsel asserts that the Respondent was obligated to make clear its positions during a lockout by clarifying confusing positions and intentions and that it simply did not do so. It argues on brief at 97:

> Had Respondent truly never intended that its proposal impact the return of locked-out employees, it certainly did not meet its burden of clearly communicating that intention to the Union in a way that was not ambiguous, confusing, or inconsistent. *See Alden Leeds,*

---

[21] The consequence of the loss of economic-lockout status to an employer is significant because without that status, the lockout of regular employees has been found to be unlawful conduct which is inherently destructive of employee rights. Such conduct may be proscribed without an affirmative showing of an unlawful motive. As the Supreme Court explained, such inherently destructive conduct carries with it "unavoidable consequences which the employer not only foresaw but which [it] must have intended" and thus bears "its own indicia of intent." *NLRB v. Great Dane Trailers*, 388 U.S. 26, 33 (1967) (citing *NLRB v. Erie Resistor Corp.,* 373 U.S. 221, 228, 231 (1963)).

> *Inc* 357 NLRB No. 20 (2011) (unlawful to lock out employees in support of terms that were ambiguous, confusing, and internally inconsistent), *Eads Transfer*, 304 NLRB at 712-13 (waiting two months into a lockout to inform them the lockout was in support of its bargaining proposals was an unlawful failure to inform employees of terms necessary to end the lockout).

Both the Charging Party and the General Counsel argue that the conduct of the Respondent on August 10, 2010—viewed as conduct violative of Section 8(a)(5) of the Act and rendering the lockout improper—cannot be simply undone by changes in bargaining positions later in point of time. Thus the General Counsel notes at footnote 35 at page 98 of his brief:

> It is well established that, once deemed unlawful, a lockout retains its "taint of illegality until it is terminated and the affected employees are made whole." *Alden Leeds, Inc.*, 357 NLRB No. 20, slip op. at 2 fn. 3 (2011) (providing union with clear terms of its bargaining proposals one week after locking out employees in support of terms that were unclear did not cure lockout's illegality)(internal citations omitted).

(2) Union security

The expired contract and previous contracts contained a union-security clause requiring unit members after 30 days employment to join the Union and tender dues and initiation fees. The Respondent's initial proposal carried this same language forward and on this basis, a tentative agreement was reached.

In roughly February, March, and April, apparent dissention among the unit employees and the Union culminated in a decertification election vote conducted on April 2. It resulted in a 41-17 victory for the Union. The Respondent, on April 27, modified its union-security proposal to reflect a modified agency-shop arrangement. Per its terms, employees would be obligated to pay dues and initiation fees to the Union but in certain cases did not have to join or maintain membership in the Union. Counsel Murphy explained to the Union the Club's rationale for the modified proposal:

> [W]e felt that, as part of moving forward, in order to take care of that rift among employees and make this a workplace that minimized those rifts, that we at least wanted employees who were involved in that to have an option not to be required to maintain union membership because there obviously a lot of hostility towards them from the Union representatives themselves.

The Respondent altered its proposal again on August 10. The August 10 proposal now contractually required only unit employees who were present union members to maintain membership and pay dues and initiation fees to the Union. Employees who were not Union members at the time the contract went into effect and new hires would thereafter not have to join the Union or pay dues and initiation fees. As reasons for the changes, counsel Hulteng again cited the employee dissidence that culminated in the Board election as well as the prospect of temporary employees becoming unit employees.

The General Counsel and the Charging Party argue that, to the extent employees were agitated in their relations with the Union in early 2010, the rationale for changing the union-

security proposal may arguably support the April 27 modified proposal offered by Murphy, but it would not equally support the delayed August 10 amendment which would act to deny the union dues income from employees that it was obligated to represent. It therefore constitutes a markedly regressive and hostile amended offer, one totally inconsistent with the parties' long contractual history and the tentative agreement reached early in the negotiations to carry forward the expired contract's union-security clause.

I agree with the General Counsel and the Union that the Respondent's maintenance of the new proposal on August 10 was a significant regression from its earlier April 27 modified agency-shop proposal and that the Respondent's rationale for the proposal is questionable. First the April 27 proposal was made to the Union *after* the decertification election. Between April 27 and August 10, no new events relevant to the dissidence question occurred to justify this new regression in the union-security language.

Second, Hulteng made it clear in describing the proposals of August 10 to the Union negotiating team on August 10 that things were going to be getting tougher because the Club had simply reevaluated its relationship with the Union. Such statements reveal the motive of the Respondent was not directed to improving relations among employees who might view the Union differently, but rather was designed to show the Union who was boss and teaching it a lesson for its conduct to date.

The assertion of Hulteng that the clause was necessary because of "the prospect of temporary employees becoming unit employees who could be expected to be less than full supporters of the Union" is a confusing statement which undermines the ability of the locked-out employees and their Union evaluate their bargaining position as discussed earlier.

.The Board found in *Driftwood Convalescent Hospital*, 312 NLRB 247 (1993), enfd. mem., 67 F.3d 307 (9th Cir. 1995), that the employer bargained in bad faith with the intent of obstructing bargaining when it withdrew from tentative agreements reached with the union and provided no explanation for its action to the union or the Board. The Board also found, based on the totality of the circumstances and particularly in the context of the employer's reneging on the parties' tentative agreements, that the employer engaged in bad-faith bargaining by its unexplained withdrawal of other proposals and substitution of regressive proposals.

(3) Subcontracting

The expired contract addressed subcontracting by allowing the Respondent to undertake subcontracting concerning only certain peripheral unit work. The Respondent's April 27 proposal addressed that issue, and the parties had essentially agreed upon the language of the subcontracting limitation, or at least were not significantly far apart, save as to a single classification. The proposal only narrowly allowed subcontracting.

In contrast, the August 10 proposal provided new language that constituted a waiver of Union statutory rights to notice and bargaining of any and all subcontracting of unit work conditioned only on the Respondent providing an opportunity for the Union to meet and confer. Counsel for the Respondent indicated the new proposal was a "slight" change from the older language. The Union did not agree. Its notes indicate the following exchange at the August 10 session:

> [RH] Section 17 - the proposal made to you in May on this subject, we are continuing to propose a change in that section. I have changed the language slightly. The last proposal called out specific groups that we might want to subcontract. This opens it up to subcontracting for any group with a meet and confer.
>
> WL: that's not minor. Subcontracting the whole bargaining unit versus specific groups.

I specifically find the proposal is not a slight language change; rather, it was a matter of great significance and a seriously regressive proposal offered essentially without warning or explanation of the Respondent's motivation or need for the new language.

Counsel for the Respondent in discussing this proposal indicated "we're not proposing to subcontract anything, just to have that option in 'the future.'" Counsel for the Respondent also alluded again to the fact that the Club and its membership were now less sympathetic to the locked-out employees and hinted that the new proposals reflected that fact: "RH: on the union shop and subcontracting, the signals have been made that they felt we needed to go in a new direction."

It is unusual to introduce in mid-negotiations an important contracting proposal that would significantly limit the Union's contractual and statutory rights in a broad and important area such as unlimited subcontracting absent an explaining event or circumstance. This is especially so when the employer explains the new proposal as only a "slight change" from the previous proposal, which it was not, and when it has no current intention to subcontract in reliance on the contractual waiver. As Respondent's representatives explained, the proposal for unlimited subcontracting was "just to have that option in 'the future.'"

I find the new subcontracting proposal by the Respondent, under all the circumstances and with the description and explanation offered by the Respondent, to be very important. Simply put, it seems to be a bald expression of intention to materially reduce the Union's previous contractual arrangement and statutory rights through strongly regressive contract language.

The Board finds an inference of bad-faith bargaining appropriate when an employer's proposals, taken as a whole, would leave the union and the employees it represents with substantially fewer rights and less protection than provided by law without a contract. *A-1 King Size Sandwiches*, 265 NLRB 850, 859–861 (1982), enfd. 732 F.2d 872, 877 (11th Cir. 1984); *NLRB v. Johnson Mfg. Co. of Lubbock,* 458 F.2d 453, 455 (5th Cir. 1972); *E. Me. Med. Ctr. v. NLRB*, 658 F.2d 1, 12 (1st Cir. 1981); *S.C. Baptist Ministries*, 310 NLRB 156, 157 (1993); see *Logemann Bros.*, 298 NLRB 1018, 1021 (1990). While the cited cases do not establish that the subcontracting proposal is alone a violation, they do support treating the proposal as persuasive evidence that the Respondent was taking a position hostile to the Union's status as representative of its employees.

(4) Scheduling bargaining sessions

The bargaining session colloquy on August 10 respecting scheduling additional or multiple bargaining sessions has been noted at length. The Union sought frequent, multiply scheduled bargaining sessions to address the Respondent's important and regressive new

proposals, to understand those proposals, and to attempt to narrow the differences between the parties. The Respondent would only schedule one meeting at a time and asserted that the Union had to made significant concessions approaching the Respondent's positions as a precondition to more frequent meetings. At meeting's end, the Union's notes record the differing views on the issue:

> WH: I think there are plenty of things to talk about We've spent 5 hours together total in the past 6 months. In the interim, there are all these new proposals that we haven't had a chance to understand their impact There are issues the club has raised that seem to be impediments to settlement, so we should work to eliminate them.
> RH: we need to take this one step at a time. Let's see how it goes on the 13th and then set a date.
> WH: the pattern has been that we hear "oh, we'll get back to you," then get a date 6 weeks later. That's what was challenging about my own schedule in the beginning of bargaining. The approach you're suggesting has been proven not to work. So I want to tentatively schedule a few dates at a time. We can cancel them if needed. RH: I just don't agree. We'll set a date for the 13th and then schedule a date from there, promptly if it looks like we're getting somewhere.
> WH: it's clear from the last 6 months that not meeting does not work. Maybe meeting won't either, but let's at least try it.
> RH: I just won't commit to more than one date without seeing how it's going.

The Respondent argues that "[a]fter seven months of the lockout without a new Union proposal, the Employer in September agreed to set further meeting dates, but conditioned more frequent meetings on the Union moving on the outstanding economic issues." (R. Br. 44). The Respondent further noted that throughout the bargaining the Union was slow to make proposals or to respond to the Respondent's proposals. It contended then that it was fully appropriate for the Respondent to condition meeting frequency and to take it, in effect, one bargaining session at a time.

The Respondent's argument is not incorrect in appropriate circumstances. The sufficiency of a party's willingness to meet and bargain is very context and setting specific and requires consideration and analysis of all the relevant circumstances at all relevant times.

What is unusual in the instant case, and of importance to the analysis of the Respondent's willingness to meet after August 10, is the fact that the Respondent's new contract proposals made that day changed or rather expanded in a profound way the matters in contention in bargaining. There were now many new and important differences that had to be addressed.

The bargaining had been somewhat moribund in the months up to Mr. Hulteng's arrival in bargaining for the first time on July 14, and his new proposals at the next session—that of August 10—truly separated the previous bargaining cadences from later bargaining which included the new proposals. As the Respondent made clear that day, the Respondent had reevaluated things and they were going to be different from then on. I find the bargaining as of August 10 to constitute a largely new context which does not allow the form and rhythms of the earlier negotiations to set a standard for behavior in the August 10 bargaining or in scheduling later bargaining sessions.

Additional, critical matters of profound importance to the Union were at issue for the first time on August 10. Moreover, these proposals were complex, not fully understood by the Union, and in need of explanation. The Union sought more bargaining sessions to understand the proposals and their import for the Union and the bargaining unit then locked-out. The best example of these complications is the discussion respecting the effect of the Respondent's seniority language on the end of the lockout staffing.

In this setting, it was clearly unreasonable for the Respondent to condition frequent bargaining sessions or condition the scheduling of multiple days of bargaining to avoid scheduling delay. The Respondent had an economic lockout in effect and was operating with temporary employees. The locked-out employees and the union that represented them could not intelligently evaluate their bargaining position without an understanding of the Respondent's new proposals and the effects of those proposals. Acquiring that understanding required the educational process of bargaining—likely considerable bargaining. Cross table education, however, was being denied or at best impermissibly conditioned on the Union making immediate substantive concessions. The Respondent's excuse is based on a history that had been rendered inapplicable by its new suite of proposals.

e. Consideration of the totality of circumstances

To find a violation of Section 8(a)(5), the totality of a party's conduct must be such as to sustain the General Counsel's burden of proof that there was no intent by that party to reach agreement on the terms of a new collective-bargaining agreement. In such an analysis, proposals must be considered "not to determine their intrinsic worth but instead to determine whether in combination and in the manner proposed they evidence an intent not to reach agreement." *Coastal Electric Cooperative.*, 311 NLRB 1126, 1127 (1993). From the context of an employer's total conduct, it must be decided whether the employer is engaging in hard, but lawful bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement. Although the Board does not evaluate whether particular proposals are acceptable or unacceptable, the Board will examine proposals when appropriate and consider whether, on the basis of objective factors, bargaining demands constitute evidence of bad-faith bargaining. *Reichhold Chems*, 288 NLRB 69 (1988), affd. in relevant part sub nom. *Teamsters Local 515 v. NLRB*, 906 F.2d 719 (D.C. Cir. 1990).

I have considered the various specific allegations and arguments of the parties on brief and at trial concerning the Respondent's contract bargaining. In reaching the conclusions below, I have also considered the record as a whole and the violations of the Act found supra. I have been especially cognizant that the General Counsel bears the burden of proof as to each allegation of the complaint.

Looking at the Respondent's conduct in bargaining on August 10 and the surrounding circumstances, I find that that the Club had abandoned its earlier good faith bargaining for a new contract and, as of August 10, 2010, the Respondent was no longer bargaining in good faith with an intent to reach an agreement. Rather, it was unlawfully endeavoring to frustrate the bargaining process and reduce the possibility of the parties arriving at any agreement. I further specifically find, based on the record as a whole and with special focus on the remarks of the Respondent's counsel Hulteng at the August 10 bargaining, that the Respondent had reevaluated its bargaining posture in light of the Club's members and governing officers disapproval of the Union. I further

find that the Respondent's conduct on that date and the positions taken in bargaining on that day were undertaken because of its animus toward the Union and animus to the locked out employees who supported the Union in bargaining.

The elements forming the primary basis for my findings have been treated in detail above but are briefly and summarily described here. First, the proposals of the Club on August 10 were either new proposals or proposals deviating from earlier agreements of the parties. The Respondent's sudden proposal of contract language in essence waiving the Union's rights to bargaining about subcontracting, without a meaningful justification or explanation, is one example. The new union-security proposal is another. The Respondent's arguments seeking to justify its regressive proposals and/or proposals departing from earlier tentative agreements offered either on August 10 or on brief are not persuasive.

The Respondent also associated its seniority contract language with its expressed desire to be unfettered in selecting a post-lockout workforce from the ranks of both returning locked-out employees and the temporary employees. At a minimum, this muddied or confused its bargaining posture and made it impossible for the Union and the locked-out employees it represented to intelligently evaluate their position in bargaining during their lockout. This conduct was not consistent with the advancement of the Respondent's legitimate bargaining position.

I also find it significant that Respondent's specifically rejected the Union's scheduling requests. All parties knew that the Respondent's fusillade of new, significant, and regressive proposals would require time at the bargaining table and an opportunity for dialog in order for the Union to understand the proposal's meaning and consequences. The Respondent aggravated the need for time and bargaining by its—at best confusing, if not bad-faith—assertions about the seniority proposal's application to merging the ranks of returning workers and replacements.

Finally, while not dispositive, the violations of the Act outside the bargaining table support my conclusions. The Respondent maintained unlawful rules, which it published and applied directly to threaten employee protected activity in violation of the Act. Respondent communicated to an employee that the Club's board of directors would never allow the locked-out employees to return. The Respondent wrongfully subcontracted a portion of unit work that had no history of being subcontracted and did so without notifying the Union or providing it an opportunity to bargain about the decision or its effects on the bargaining unit.

For the preceding reasons, I find that the Respondent engaged in bad-faith bargaining from August 10, 2010. I further find that the bad-faith bargaining violated Section 8(a)(5) and (1) of the Act as alleged in the complaint. The Respondent, having neither acknowledged nor remedied its violative bad-faith bargaining on or after August 10, has for that reason continued to bargain in bad faith at all times thereafter in violation of Section 8(a)(5) and (1) of the Act.

For all of the above reasons, I sustain the General Counsel's complaint that the Respondent bargained in bad faith with the Union respecting the terms of a new contract on and after August 10, 2010.

7. The status of the lockout on and after August 10

Bargaining in bad faith without a desire or intent to reach an agreement with the Union on the terms of a new contract, as found above, is conduct inconsistent with an economic lockout. Maintaining a lockout of unit employees and employing temporary employees to do the work of the locked-out employees, as discussed supra, supports my earlier finding of an unlawful motive. Here the additional finding of unlawful motive is based on that inherently destructive conduct which under Board law carries with it "unavoidable consequences which the employer not only foresaw but which [it] must have intended" and thus bears "its own indicia of intent." *NLRB* v. *Great Dane Trailers,* 388 U.S. 26, 33 (1967) (citing *NLRB* v. *Erie Resistor Corp.,* 373 U.S. 221, 228, 231 (1963)).

Based on the discussion and analysis above, and having found that the Respondent's bad-faith bargaining was conduct inconsistent with an economic lockout I further find that the Respondent's wrongful conduct on August 10 ended the legal lockout. The continuing lockout of unit employees after that time, along with the employment of temporary employees doing the locked-out employees' work after that time, violated Section 8(a)(5), (3), and (1) of the Act. In the alternative—by reason of the Respondent's bad-faith bargaining, its inherently destructive conduct,[22] and its anti-union animus, I find the lockout from August 10 onward violated Section 8(a)(5), (3), and(1) of the Act.

8. The Charging Party's motion for certain litigation costs[23]

The instant case involves contested collective bargaining sessions in which counsel for the Respondent Hulteng was both the Respondent's spokesperson and its bargaining note taker. Mr. Hulteng is a very experienced labor lawyer and senior partner in a large employment law firm. He has been involved in very many negotiations for clients and testified he has regularly taken bargaining notes during bargaining sessions. He further testified that he has as a regular practice taken contemporaneous bargaining notes as a negotiator and does not thereafter alter or amend them. Finally, he testified that he retain these notes and regards them as a source of information about bargaining.

In the instant case, both sides identified and offered their bargaining notes, including Mr. Hulteng's four pages of handwritten notes from the August 10, 2010 bargaining session, into evidence as business records. They were received into evidence without objection. Mr. Hulteng initially testified he had not altered the notes at issue after their composition save in minor ways not here relevant.

---

[22] For example, maintaining the lockout and employment of temporary employees when doing so was no longer in support of its economic position, but rather was in support of bad-faith bargaining,

[23] The theory of the Charging Party for recompense is not based on a remedy for a violation of the Act or for the frivolity of a litigant's position in the unfair labor practice case. Were the motion sought in that context it would be dealt with in the Remedy section of this section, infra. Rather, since it is predicated on and argues evidentiary mishandling independent of the allegations of the complaint or the relevance of the evidence involved to particular elements of the unfair labor practice allegations, it is addressed here as a freestanding section of the decision. Similarly, the Charging Party's motion for referral, infra, is also considered as a freestanding part of this decision and not part of the remedy analysis infra.

On the expected final day of the hearings in the instant case, the Charging Party moved to obtain custody of Hulteng's original bargaining notes for the August 10 session in order to submit them to a forensic document examiner for purposes of determining if they had been altered or amended. The motion was granted, the examination took place, and the forensic examiner appeared and credibly testified as an unchallenged expert witness that Hulteng's notes for the August 10, 2010 bargaining session had been altered in 4 places.

Counsel Hulteng thereafter testified that he had had his memory refreshed by these events and now recalled three alterations he had made to the notes. He did not recall but specifically did not contest the fourth alteration identified by the forensic examiner. He testified:

> [D]uring the course of the November 9th [2010] bargaining, either during a break or at the end, I had in fact gone back and added a couple of entries -- actually, three entries that I recalled after looking carefully at the notes, which I believed were supplementing and adding to the notes to reflect things that were said on the August 10th session.

The Charging Party views Hulteng's motives in changing the notes with alarm. It notes that the charge in Case 32-CA-25397 had been filed on October 18, 2010, making allegations respecting the parties' bargaining on August 10, 2010. It also points out that what took place at the August bargaining session was discussed by the parties, including Hulteng, at the November 9, 2010 bargaining session. Thus, there were active NLRB charges under investigation—a fact known to Hulteng—that addressed the things said and done at the August 10 session at the time Hulteng altered his notes respecting the August session. The Charging Party notes further that, in his original testimony in this proceeding, before the changes in the notes were uncovered by the Charging Party, Hulteng testified he habitually does not alter his notes and that these notes were not and had not been altered.

The Respondent argues the entire matter was the result of a simple failure of Hulteng's memory in recalling the innocent emendations which merely conformed the notes to Hulteng's memory of the bargaining events.

At the threshold I accept the argument of the Charging Party that an administrative law judge in an unfair labor practice proceeding may award specific litigation expenses consequent to bad acts by other parties in the litigation. *675 W. End Owners Corp*., 345 NLRB 324, 326 n.11 (2001), enfd. 304 F. Appx 911 (2d Cir. 2008); *Unbelievable, Inc. v. NLRB*, 118 F.3d 795, 800 (D.C. Cir. 1997).

What, if any, acts herein justify consideration of the award of such a special remedy? The Charging Party argues two: first, Hulteng's act of changing the notes in the specific context here presented and second, Hulteng's subsequent testimony that the notes were not altered and the offering those notes into evidence as unaltered notes and business records.

It is appropriate to deal first with the act of modifying the notes. The Respondent argues that the emendation of the notes was innocent and simply brought the notes in conformity with Hulteng's recollection of the actual events of the bargaining session. Seeing something more grave, the Charging Party argues on brief at 113-114:

By altering the bargaining notes, Hulteng spoliated evidence. *Silvestri v. General Motors Corp*., 271 F.3d 583, 590 (4th Cir. 2001) ("Spoliation refers to the destruction or material alteration of evidence or to the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation."); see also *Leon v. IDX Systems Corp*., 464 F.3d 951, 959-61 (9th Cir. 2006*); West v. Goodyear Tire & Rubber Co.,* 167 F.3d 776, 779 (2d Cir. 1999).[35] Spoliating evidence, even if to make it more accurate, is a bad act. *In Moore v. R.T.L. Construction, Inc*., 2011 WL 4738154 (D. Minn. August 23, 2011), the district court sanctioned a party that altered a document by ordering the defendant to pay the plaintiff's fees and costs. Id. at *9. In that case, as here, the defendant claimed that it altered the document to make it more accurate. The Court emphatically rejected that justification:

> The Court also concludes that the Stoffels document was altered intentionally and in bad faith. RTL [the defendant] suggested that the deletion of the language was to be more ―accurate because Stoffels was in fact paid for all her hours and to provide a timeline for the EEOC. Even if the Kroll version of the Stoffels document was ―inaccurate because Stoffels was paid for all her hours, this does not allow for alteration of a relevant document. Rather, the proper remedy would have been to submit testimony or an affidavit explaining away the damaging statement. The fact that the deleted language supports Plaintiffs' allegations is troubling . . . .

Based on the record as a whole and the arguments of the parties, I find and rule as follows. There is no dispute that counsel Hulteng altered his bargaining notes. I agree with the Charging Party based on the cases cited that it was immaterial whether his additions to the contents of the notes were intended at the time they were made to conform the notes taken with his memory of the bargaining session covered by the notes or were not made for that reason. Counsel Hulteng was a very experienced labor lawyer, bargainer, and bargaining session note taker. He well knew collective-bargaining notes were admissible as contemporaneous records of events and he also knew at the time he added to the notes that NLRB charges had been filed and litigation respecting what happened at the bargaining session the notes covered was at the very least a likely possibility.

In such circumstances I find that counsel Hulteng by admittedly deliberately adding to his bargaining notes in the context described was engaging in the spoliation of documents he knew or should have known were potential, if not likely, evidence in a Board unfair labor practice proceeding. I find his conduct was negligent. Without more, however, I cannot and do not make a finding that Hulteng's conduct in altering the bargaining notes rises to the level of "bad acts."[24]

The earlier cited Board cases do not, in my view, specifically hold that costs may be awarded by an administrative law judge in an unfair labor practice proceeding for parties' expenses consequent to spoliation of evidence.

As the counsel for the Charging Party has argued in the cases cited by her above, the federal courts have inherent authority to apply sanctions to a party for spoliation of evidence

---

[24] I specifically make no findings about the Charging Party's theory of Hulteng's possible intention to deceive by the alterations or about other argued malum respecting the amendments,

because spoliation undermines the integrity of legal proceedings. *Silvestri*, supra, 271 F.3d at 590.

The Board has held that its administrative law judges have discretionary authority under the National Labor Relations Act, the Administrative Procedure Act, and the Board's Rules and Regulations in unfair labor practice proceedings. *See George Joseph Orchard Siding, Inc.,* 325 NLRB 252, 252 (1998) (finding this authority in the case of a judge's order to appoint an interpreter). This authority exists despite the fact that it is not specifically set forth in these authorities. *See id.* As the Board explains, the authority is inherent in the administrative law judge's duties and powers to regulate the course of the hearing. *See id.* The Board further holds that administrative law judges should be guided by the Federal Rules of Civil Procedure respecting matters not specifically controlled by the language of the Act, Board rule, or Board decisional instruction. See *Teamsters, Local 722*, 314 NLRB 1016, 1025 (1994), enfd. 57 F.3d 1073 (7th Cir. 1995) (unpublished table decision).

The Federal Rules of Civil Procedure address the requirements for preservation of evidence as well as the spoliation of evidence and sanctions for spoliation. *Zubulake v. UBS Warburg, Inc. (Zubulake IV)*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003).

Based upon all the above, I find it is proper under the circumstances here presented to consider Charging Party's motion for the narrow award of consequential costs of altered or spoiled evidence as described herein. I find the granting of such a spoliation of evidence cost recovery motion falls within an administrative law judges inherent authority to regulate and control the trial and the presentation of evidence.

Given my finding that ruling on the instant motion is within my inherent authority as an administrative law judge in an unfair labor practice proceeding, it is appropriate to turn to the motion itself. Do the circumstances involved herein make an appropriate case for awarding the Charging Party its costs of establishing the spoliation of the relevant evidence?

As noted above, I have found the conduct of Hulteng was negligent, but I specifically did not find the conduct under challenge rose to the level of bad acts or that Hulteng had scienter during the spoliation. The degree of scienter necessary to impose sanctions for spoliation under the Federal Rules of Civil Procedure is not fully settled, but it is sufficiently clear, and I find, that an award of costs incurred respecting limited evidence spoliation may be supported based on a finding of ordinary negligence. *Residential Funding Corp. v. DeGeorge Fin. Corp*., 306 F.3d 99, 108 (2d Cir. 2002).

The Charging Party wants costs "reimbursed only for the expenses it incurred in connection with the expert forensic document examiner." (CP Br. 115). The Respondent argues that as soon as the notes were challenged by the Charging Party, the Respondent offered to stipulate to certain additions to the notes and not to contest the Charging Party's counsel's actions. Therefore, argues the Respondent, there was no need to incur the expenses of forensic examination and the presentation of forensic testimony. Since the costs were not reasonably incurred, they should not be compensated by the Respondent.

I reject this argument. First, it is probable the expenses preceded the proffered stipulations. Further, the Charging Party could not prudently accept the Respondent's offer of a

stipulation that certain changes to the notes had been made until it was satisfied it knew as precisely as possible just what changes had in fact been made. Indeed in the actual event herein, the Respondent, through Hulteng, was able to recall only three changes to the notes and simply acquiesced in the expert's testimony respecting the fourth. Absent the forensic examination and the forensic examiner's testimony, there would have been nothing for the Respondent to stipulate to respecting the existence of a fourth alteration.

Given all the above, I grant the Charging Party's request for the award of limited litigation costs associated with the forensic examination and testimony respecting the August 10, 2010 bargaining notes of counsel for the Respondent Hulteng. Respondent shall pay the Charging Party its costs "in connection with the expert forensic document examiner" as have been discussed above. Such costs shall be limited to reasonable costs actually incurred for reasonable actions taken and, as necessary, the specification of the particular actions of the forensic examiner to be compensated and the monetization of the award may be litigated in the compliance stage of this proceeding. Interest as is directed elsewhere herein shall also obtain.[25]

9. The Charging Party's motion for referral

The Charging Party on March 1, 2012, moved me as the trial administrative law judge, invoking Board Rule 102.177(e), for the referral of the Respondent's counsel, Robert G. Hulteng, to the investigating officer for institution of disciplinary proceedings. Board Rule 102.177 states in part:

> **§102.177** Exclusion from hearings; Refusal of witness to answer questions; Misconduct by attorneys and party representatives before the Agency; Procedures for processing misconduct allegations.
>
> (a) Any attorney or other representative appearing or practicing before the Agency shall conform to the standards of ethical and professional conduct required of practitioners before the courts, and the Agency will be guided by those standards in interpreting and applying the provisions of this section.
>
> (b) Misconduct by any person at any hearing before an administrative law judge, hearing officer, or the Board shall be grounds for summary exclusion from the hearing. Notwithstanding the procedures set forth in paragraph (e) of this section for handling allegations of misconduct, the administrative law judge, hearing officer, or Board shall also have the authority in the proceeding in which the misconduct occurred to admonish or reprimand, after due notice, any person who engages in misconduct at a hearing.
>
> (c) The refusal of a witness at any such hearing to answer any question which has been ruled to be proper shall, in the discretion of the administrative law judge or hearing

[25] Given my ruling, it was unnecessary to make any additional findings respecting the conduct of counsel Hulteng, and I specifically make none. The award is based on the finding of negligence made above and on no additional analysis or consideration of the conduct under challenge.

officer, be grounds for striking all testimony previously given by such witness on related matters.

(d) Misconduct by an attorney or other representative at any stage of any Agency proceeding, including but not limited to misconduct at a hearing, shall be grounds for discipline. Such misconduct of an aggravated character shall be grounds for suspension and/or disbarment from practice before the Agency and/or other sanctions.

(e) All allegations of misconduct pursuant to paragraph (d) of this section, except for those involving the conduct of Agency employees, shall be handled in accordance with the following procedures:

(1) Allegations that an attorney or party representative has engaged in misconduct may be brought to the attention of the Investigating Officer by any person. The Investigating Officer, for purposes of this paragraph, shall be the Associate General Counsel, Division of Operations-Management, or his/her designee.

The Charging Party it its motion argues [citation to exhibits and transcript omitted]:

Mr. Hulteng engaged in misconduct by introducing into evidence bargaining notes for August 10, 2010 that were altered and offering sworn testimony about those notes that was intended to conceal the alterations.

The Charging Party supports its position with citations to Board decisions: *In re David M. Kelsy*, 349 NLRB 327 (2007), and *Invista*, 346 NLRB 1269, 1269 fn. 3 (2006), both holding that it is appropriate to refer attorney conduct involving false testimony or the offering of altered or fabricated exhibits into evidence.

The Respondent opposes the Charging Party's motion arguing, inter alia, that counsel Hulteng's original testimony and the Respondent's offer of the augmented exhibit were the innocent result of simple forgetfulness, on the spur of the moment, when the possibility of earlier document changes was first raised. To the extent the Respondent addresses the substantive questions of finding misconduct, such argument is not material. Here the question is one of referral to an investigating officer and not the actions of such an officer once a matter is referred.

Based on the entire record, including the testimony of witnesses including Mr. Hulteng, as well as the briefs of the parties and the instant motion and the response thereto, I find and conclude as follows.

The Board's rule and the cited cases concerning it do not set forth a standard for determining if it is appropriate to initiate a Rule 102.177 referral. The Board's Rule 102.177(e)(1) provides: "Allegations that an attorney or party representative has engaged in misconduct may be brought to the attention of the Investigating Officer *by any person*." (Emphasis added.). Therefore, the Charging Party is entitled under the rule to initiate such actions as it sees fit. Fundamentally, no party need seek the permission of the trial unfair labor practice judge, by motion or otherwise, to put appropriate matters to the Investigative Officer under the rule. Equally, should I feel it appropriate, I could initiate on my own motion under Rule 102.177(e)(1).

I am very reluctant to take on a role not created under the cited rule, i.e., adopting or rejecting a Rule 102.77 referral request, when the rule is clearly designed to open the procedure to the initiation of any person and explicitly does so. If I review a motion by the Charging Party under Rule 102.77, it seems to me, by putting another step between the initiating action of any party and the actual referral, my review undermines the broader empowerment of all parties intended by the rule. Intermediation, judicial or not, should not be imposed on any party to condition a broadly established right under the rule to bring a matter directly to the attention of the investigating officer. That is the fair meaning implicit in this unambiguous Board rule.

Given my finding that the rule creates a right in all parties, including the Charging Party, which right is not conditioned on the approval of a hearing judge, I find it would be inappropriate to rule on the motion. My approval would be superfluous: my disapproval would be error. Therefore I shall do neither. On that basis, and on that basis alone, I shall take no further action on the motion.

On the basis of the above findings of fact and on the entire record herein, I make the following conclusions of law.

Conclusions of Law

1. The Respondent, Castlewood Country Club, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party, Unite Here Local 2850, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Charging Party represents the Respondent's employees in the following unit (the unit) which is appropriate for bargaining within the meaning of Section 9 of the Act:

> All full-time and regular part-time employees engaged in or in connection with the preparation, handling and serving of food and/or beverages, including all food and cocktail waiters and waitresses, banquet waiters and waitresses, banquet captains, bar person (bartenders), service bartenders, busboys (bussers), dishwashers, all cooks including dinner cooks, sous chefs, cook(s)in charge, night cooks, griddle cooks, fry cooks, and cook's helpers, pantry employees, cashiers, housemen, all maintenance (general repair) employees and housekeepers/housekeeping employees, employed by the Employer at its Pleasanton, California facility; *excluding* all managerial and administrative employees, salespersons, office clerical employees, grounds maintenance employees (including mechanics), mechanical engineers, utilities employees, pro-shop employees, including merchandisers, cart staff and mechanics, and other golf and tennis personnel, guards, and supervisors as defined in the Act.

4. The Respondent violated Section 8(a)(1) of the Act by engaging in the following acts and conduct as alleged in the complaints.

(a) Club General Manager Olson on or about December 7, 2009 at a bargaining session in the presence of employees told employees that they could quit their jobs if they did not like the Respondent's bargaining proposals,

(b) Since about October 1, 2009, the Club has maintained the following two rules at the Club. First, a rule prohibiting employees' "unauthorized presence at member functions and member areas" (the No-Access Rule). Second, a rule prohibiting employees from engaging in the "unauthorized distribution of literature . . . on Club premises during working time and in work or members areas" (the No-Distribution Rule).

(c) In early January 2010, the Respondent published and distributed to employees a memorandum threatening employees with discipline for violating the No-Access Rule and the No-Distribution Rule.

(d) On or about February 20, 2010, Respondent's Manager Hunt, at the Club, threatened an employee with discipline for distributing Union literature in a non-working area of the Club during non-working time.

(e) In late June or early July 2010, the Respondent acting through John Hughes at its Pleasanton, California facility, informed a unit employee that the locked-out employees would never be allowed by the board of directors to return to work at the Club.

5. The Respondent violated Section 8(a)(3) and (1) of the Act by converting the Respondent's February 25, 2010 lockout of unit employees into an unlawful lockout on August 10, 2010 and thereafter maintaining that lockout as alleged in the complaints.

6. The Respondent violated Section 8(a)(5) and (1) of the Act by engaging in the following acts and conduct as alleged in the complaints.

(a) In or around February 1, 2010, the Respondent subcontracted kitchen cleaning work, historically performed by the Respondent's unit employees, which subcontracting relates to unit employees' wages, hours and other terms and conditions of employment, a mandatory subject of bargaining, without prior notice to the Union and without affording the Union an opportunity to bargain with respect to the contracting and the effects of the contracting.

(b) On August 10, 2010, and at all times thereafter, the Respondent engaged in bad-faith bargaining with the Union without attempting in good faith to reach agreement with the Union on the terms of a new contract.

(c) On August 10, 2010, and at all times thereafter, the Respondent engaged in bad-faith bargaining with the Union by maintaining a lockout of unit employees while utilizing temporary replacement employees at a time when it no longer sought in good faith to reach an agreement with the Union on terms of a new agreement and therefore no longer was locking out unit employees or employing temporary employees to support a good faith economic position in collective bargaining for a new contract.

7. The unfair labor practices described above are unfair labor practices affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

REMEDY

I found that Respondent violated Section 8(a)(1) of the Act on December 7, 2009 by telling its employees that they could quit their jobs if they did not like Respondent's bargaining proposal, thereby threatening employees with loss of their jobs for pursuing their interests through collective bargaining. In cases of employer threats to employees, the Board's approved remedy is a cease and desist order accompanied by posting of a remedial notice. E.g., *W.D. Manor Mechanical Contractors, Inc.*, 357 NLRB No. 128 (2011); In re *Equip. Trucking Co.*, 336 NLRB 277, 287 (2001). As such, I shall recommend that Respondent be ordered to cease and desist from such threatening conduct, and any like or related conduct, and to post the attached remedial Board notice.

I found that Respondent violated Section 8(a)(1) of the Act by maintaining overbroad rules limiting employee access to the workplace and prohibiting the distribution of pamphlets and literature. The proper remedy in such cases is an order commanding the employer to cease and desist from maintaining the rules, to remove the rules from the employee handbook or comparable published materials, to inform employees of the withdrawal of the rules, and to post a remedial notice. E.g., *Taylor Made Transp. Services*, 358 NLRB No. 53 (2012); *Double Eagle Hotel & Casino*, 341 NLRB 112, 115–116 (2004), enfd. as modified 414 F.3d 1249 (10th Cir. 2005). Accordingly, I shall recommend that Respondent be ordered to cease and desist from maintaining the two rules, and any other similar overbroad rules, to remove the rules from its employee handbook, notify employees in writing of the rules' rescission, and to post the attached remedial Board notice.

I found that Respondent violated Section 8(a)(1) of the Act when, pursuant to the pair of overbroad rules cited above, its Manager Hunt threatened employee Medina with a warning for leafleting. The proper remedy for such a threat is the same as that discussed relative to the threat of December 7, 2009. Accordingly, I shall recommend that Respondent be ordered to cease and desist from such threatening conduct, and any like or related conduct, and to post the attached remedial Board notice.

I found that Respondent violated Section 8(a)(1) of the Act when its manager, Hughes, told an employee that locked-out workers would never be allowed by the board of directors to return to work at the Club. The proper remedy for such a threat is also the same as that discussed relative to the threat of December 7, 2009. Accordingly, I shall recommend that Respondent be ordered to cease and desist from such threatening conduct, and any like or related conduct, and to post the attached remedial Board notice.

I found that Respondent violated Section 8(a)(5) and (1) of the Act by subcontracting kitchen cleaning without affording the Union an opportunity to bargain about the subcontracting or its effects. Therefore, I shall recommend that Respondent be ordered to cease and desist from subcontracting bargaining unit work in the absence of an overall agreement or lawful impasse in collective bargaining negotiations; to bargain in good faith with the Union as the exclusive representative of the employees in the Unit; to restore to bargaining unit employees all terms and conditions of employment prior to the subcontracting; and to make the bargaining unit employees whole for any loss of earnings and other benefits suffered as a result of the unilateral

subcontracting. See, e.g., *Pratt Industries.,* 358 NLRB No. 52 (2012); *Wehr Constructors Inc.*, 315 NLRB 867, 868–869 (1994), *enfd. in part and denied in part*, 159 F.3d 946 (6th Cir. 1998).

The make-whole remedy shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971). *E.g.*, *Pratt*, 358 NLRB No. 52 (2012); In re *Pepsi Am. Inc.*, 339 NLRB 986, 986 fn .2 (2003). Interest shall be calculated in accordance with *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), set aside by 647 F.3d 1137 (D.C. Cir. 2011).[26] *Pratt*, 358 NLRB No. 52 (2012).

I found that Respondent has violated Section 8(a)(1) and (3) of the Act by maintaining a lockout in support of its bad-faith bargaining position since August 10, 2010. Consequently, I shall recommend that Respondent be ordered:

1) To cease and desist from discouraging membership in or activities on behalf of the Union or any other labor organization by locking out employees or otherwise discriminating in hire or tenure of employment;

2) To offer full and immediate reinstatement to locked-out employees to their former or substantially equivalent employment without prejudice to their seniority or to other rights previously enjoyed and discharging, if necessary, those who have been hired to take their places or do their work;

3) To make whole all locked-out employees for any loss of pay or benefits suffered from the lockout maintained from August 10, 2010 onward;

4) To preserve and, within fourteen days of a request, provide at the office designated by the Board or its agents, a copy of all payroll records, social security payment records, timecards, personnel records and reports, and all other reports, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of back pay due under the terms of the Order. If requested, the originals of such records shall be provided to the Board or its agents in the same manner.

See, e.g., *National Extrusion & Mfg Co.*, 357 NLRB No. 8 (2011); *R. E. Dietz Co.*, 311 NLRB 1259, 1268 (1993). The amount of the make-whole remedy shall be calculated according to the formula of *F. W. Woolworth Co.*, 90 NLRB 289 (1950). See, e.g., *National Extrusion & Mfg Co.*, 357 NLRB No. 8 (2011); *Dietz*, 311 NLRB at 1268. Interest shall be determined as set forth above.

I found that Respondent has violated Section 8(a)(1) and (5) of the Act by failing to bargain in good faith with the Union and refusing to meet at reasonable times to do so. As a result, I shall recommend that Respondent be ordered to:

(1) Cease and desist from refusing to bargain in good faith with the Union as the certified collective-bargaining representative of bargaining unit employees, including reneging on or withdrawing from tentative agreements without good cause;

---

[26] *Kentucky River* requires that interest be compounded daily.

> (2) Cease and desist from making regressive or unreasonable bargaining proposals in order to frustrate good-faith bargaining, including insisting on a seniority clause which does not guaranty preference in tenure of employment to locked-out employees vis-à-vis replacement workers;
>
> (3) Reinstate, for purposes of good-faith bargaining, the tentative agreements reached between the Respondent and the Union regarding union security, sub-contracting and seniority.
>
> (4) On request, bargain collectively with the Union as the exclusive representative of all employees in the Unit with respect to pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

See HTH Corp., 356 NLRB No. 182 (2011) (requiring reinstatement of tentative agreements); *Camelot Terrace*, 357 NLRB No. 161 (2011) (ordering employer to cease reneging on tentative agreements without good cause); *Whitesell Corp.*, 357 NLRB No. 97 (2011) (forbidding regressive or unreasonable bargaining proposals).

In addition to physical posting of paper notices, notices shall be distributed electronically, such as by e-mail, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its members and/or employees by such means. *J. Picini Flooring*, 356 NLRB No. 9 (2010). The posting of the paper notice by the Respondent shall occur at all places where notices to employees are customarily posted.

In its amended complaint, the Acting General Counsel requested that, as part of the make-whole remedy, Respondent be ordered to reimburse employees for the difference in taxes owed upon receipt of a lump-sum payment and taxes that would have been owed but for the illegal lockout, and to submit documentation to the Social Security Administration so that back pay would be allocated to appropriate periods.

The Board considered an identical request for these two remedies in *Latino Express, Inc.* 358 NLRB No. 94 (July 31, 2012). It held respecting the sought remedies at page 2 of slip op.:

> Because adoption of these remedies in backpay cases would mark a change in Board practice, the Board has determined that it is desirable to ascertain the positions of interested parties and to solicit information from them. Accordingly, the Board has decided to sever these two remedial issues and retain them for further consideration, to permit the issuance of this decision regarding the remaining issues in the case. The Board will issue a supplemental decision regarding the Social Security reporting requirement and tax compensation remedy at a later date.

Given that ruling, I shall decline the request. The General Counsel must await the a supplemental decision in that case or another Board case and, as necessary, seek such a change in Board law on exceptions to this ruling.

Based upon the above findings of fact and conclusions of law, and on the basis of the entire record herein, I issue the following recommended Order.[27]

ORDER

The Respondent, Castlewood Country Club; its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees that they could quit their jobs or strike if they did not like the Respondent's bargaining proposals, thereby threatening employees with loss of their jobs for pursuing their interests through collective bargaining.

(b) Maintaining a rule prohibiting employees' "unauthorized presence at member functions and member areas" (the No-Access Rule).

(c) Maintaining a rule prohibiting employees from engaging in the "unauthorized distribution of literature . . . on Club premises during working time and in work or members areas" (the No-Distribution Rule).

(d) Publishing and distributing to employees a memorandum threatening employees with discipline for violating the No-Access Rule and the No-Distribution Rule.

(e) Threatening an employee with discipline for distributing Union literature in a non-working area of the Club during non-working time.

(f) Informing a unit employee that the locked-out employees would never be allowed by the Club's Board of Directors to return to work at the Club.

(g) Locking out unit employees and employing temporary employees to do unit work during the lockout at a time when the lockout is not undertaken or maintained in support of the Respondent's negotiating position during good-faith bargaining for a new contract.

(h) Subcontracting kitchen cleaning work, historically performed by unit employees without prior notice to the Union and without affording the Union an opportunity to bargain with respect to the contracting and the effects of the contracting.

(i) Bargaining in bad faith with the Union over terms of a new collective-bargaining agreement.

(j) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

---

[27] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections shall be waived for all purposes

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Remove and discontinue the rule prohibiting employees' "unauthorized presence at member functions and member areas" (the No-Access Rule) from the Club's employee handbooks and notify employees in writing of the rules rescission.

(b) Remove and discontinue the rule prohibiting employees from engaging in the "unauthorized distribution of literature … on Club premises during working time and in work or members areas" (the No-Distribution Rule) from the Club's employee handbooks and notify employees in writing of the rules rescission.

(c) Restore all subcontracted kitchen cleaning work, historically performed by unit employees, to our represented employees and will not resume subcontracting of unit work without prior notice to the Union and without affording the Union an opportunity to bargain with respect to the contracting and the effects of such subcontracting.

(d) Offer all unit employees who were discharged or lost hours as a result of the subcontracting of kitchen cleaning work, historically performed by unit employees, full reinstatement to their former jobs and hours or, if those jobs no longer exist, to substantially equivalent positions or hours, without prejudice to their seniority or any other rights or privileges previously enjoyed, in the manner described in the remedy section of this decision.

(e) Make unit employees whole for any losses they may have suffered by reason of the Respondent's subcontracting of kitchen cleaning work, historically performed by unit employees, with compound interest, as calculated in the manner described in the Remedy section of this Decision.

(f) Restore all work done by the temporary employees working during the lockout to the Unit and unit employees.

(g) Notify the locked-out employees that the lockout is ended and that unit work at the Club will again be done by the formerly locked-out employees.

(h) Offer all locked-out unit employees full reinstatement to their former jobs or, if those jobs no longer exists, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, in the manner described in the Remedy portion of this Decision.

(i) Make its locked-out unit employees whole for any losses they may have suffered by reason of the Respondent's maintenance of its lockout of unit employees on and after August 10, 2010, with interest, in the manner described in the remedy section of this decision.

(j) Commence bargaining in good faith with the Union, upon request, concerning terms and conditions of employment of unit employees and the terms of a new collective-bargaining agreement, meeting at reasonable times and frequency to conduct such bargaining.

(k) Within 14 days after service by the Region, post copies of the attached Notice at its Pleasanton, California facility set forth in the Appendix.[28] Copies of the notice, on forms provided by the Regional Director for Region 32, in English and Spanish and such other languages as are determined necessary by the Regional Director, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure the notices are not altered, defaced or covered by other material. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by e-mail, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its members and/or employees by such means. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed its California facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at the closed facility at any time after October 1, 2009.

(l) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

(m) I grant the Charging Party's request for the award of limited litigation costs incurred by the Charging Party associated with the forensic examination and expert testimony respecting the August 10, 2010 bargaining notes of counsel for the Respondent. The award of costs shall be limited to the Charging Party's reasonable costs actually incurred for reasonable actions taken associated with the forensic examination and expert testimony noted. The Respondent shall pay the noted costs to the Charging Party as part of the remedy herein. As necessary the specification of the particular actions of the forensic examiner to be compensated and the monetization of the award may be litigated in the compliance stage of this proceeding Compound interest on the sum owing, calculated in the manner interest is calculated in the Remedy section of this decision, shall also obtain.

[28] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(n) The Charging Party's motion for the referral of the Respondent's counsel to the investigating officer for institution of disciplinary proceedings shall be and it hereby is, denied.

Dated, Washington, D.C. August 17, 2012

_____
Clifford H. Anderson
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board (the NLRB) has found that we violated Federal labor law by maintaining and applying improper rules restricting employee rights, by threatening employees, and by suggesting that locked-out employees could not return to club employment.

The National Labor Relations Board has also found that we improperly subcontracted kitchen cleaning work, historically performed by unit employees, without prior notice to the Union and without affording the Union an opportunity to bargain with respect to the contracting and the effects of the contracting.

Further the NLRB has found that as of August 10, 2010, we were not bargaining with the Union that represents our employees in good faith and that our lockout of our represented employees as of that date and thereafter was invalid. The NLRB has directed us to cease our improper conduct, to return our employees to work, and to make our employees whole for their losses of wages and benefits resulting from our improper conduct with compound interest on the sums due.

The NLRB has also has ordered us to post and obey this notice.

We give you the following assurances.

WE WILL NOT tell employees that they could quit their jobs or strike if they did not like the Respondent's bargaining proposals, thereby threatening employees with loss of their jobs for pursuing their interests through collective bargaining.

WE WILL NOT maintain a rule prohibiting employees' unauthorized presence at member functions and member areas.

WE WILL NOT maintain a rule prohibiting employees from engaging in unauthorized distribution of literature on Club premises during working time and in work or members areas.

WE WILL NOT publish and distribute to employees a memorandum threatening employees with discipline for violating the above no-access rule and the no-distribution rule.

WE WILL NOT threaten an employee with discipline for distributing Union literature in a non-working area of the Club during nonworking time.

WE WILL NOT inform employees that our locked-out employees would never be allowed by the Club board of directors to return to work at the Club.

WE WILL NOT bargain in bad faith with the Union that represents our employees over terms of a new collective-bargaining agreement.

WE WILL NOT lock out our represented employees or maintain a lockout of our represented employees, utilizing temporary employees to do their work, because of the represented employees' union activities at a time when we are bargaining in bad faith with the union that represents our employees concerning the terms of a new collective-bargaining agreement.

WE WILL NOT subcontract kitchen cleaning work, historically performed by unit employees, without prior notice to the Union and without affording the Union an opportunity to bargain with respect to the contracting and the effects of the contracting.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL remove and discontinue the Club rule prohibiting employees' "unauthorized presence at member functions and member areas" (the no-access rule) from the Club's employee handbooks and notify employees in writing of the rules rescission.

WE WILL remove and discontinue the Club rule prohibiting employees from engaging in the "unauthorized distribution of literature . . . on Club premises during working time and in work or members areas" (the no-distribution rule) from the Club's employee handbooks and notify employees in writing of the rules rescission.

WE WILL restore all subcontracted kitchen cleaning work, historically performed by our employees, to our represented employees and we will not resume subcontracting of unit work historically performed by our employees without prior notice to the Union and without affording the Union an opportunity to bargain with respect to the contracting and the effects of such subcontracting.

WE WILL offer all our represented employees who were discharged or lost hours as a result of our subcontracting of kitchen cleaning work, historically performed by unit employees, full reinstatement to their former jobs and hours or, if those jobs no longer exist, to substantially equivalent positions or hours, without prejudice to their seniority or any other rights or privileges previously enjoyed, with interest. WE WILL make our represented employees whole for any losses they may have suffered by reason of our subcontracting of kitchen cleaning work, historically performed by our represented employees, with compound interest on amounts due.

WE WILL notify our locked-out employees that the lockout is ended and that unit work at the Club will again be done by the formerly locked-out employees.

WE WILL restore all work normally done by our represented employees, but done by the temporary employees working during the lockout on and after August 10, 2010, to our represented employees.

WE WILL offer all our locked-out unit employees full reinstatement to their former jobs or, if those jobs no longer exists, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make our locked-out unit employees whole for any losses they may have suffered by reason of the Respondent's maintenance of its lockout of unit employees on and after August 10, 2010, with compound interest on the sums due.

WE WILL bargain in good faith with the Union, upon request, concerning terms and conditions of employment of unit employees and the terms of a new collective-bargaining agreement, meeting at reasonable times and frequency to conduct such bargaining.

Unite Here Local 2850, AFL–CIO, a labor organization, represents our employees in the following bargaining unit:

All full-time and regular part-time employees engaged in or in connection with the preparation, handling and serving of food and/or beverages, including all food and cocktail waiters and waitresses, banquet waiters and waitresses, banquet captains, bar person (bartenders), service bartenders, busboys (bussers), dishwashers, all cooks including dinner cooks, sous chefs, cook(s)in charge, night cooks, griddle cooks, fry cooks, and cook's helpers, pantry employees, cashiers, housemen, all maintenance (general repair) employees and housekeepers/housekeeping employees, employed by the Employer at its Pleasanton, California facility; *excluding* all managerial and administrative employees, salespersons, office clerical employees, grounds maintenance employees (including mechanics), mechanical engineers, utilities employees, pro-shop employees, including merchandisers, cart staff and mechanics, and other golf and tennis personnel, guards, and supervisors as defined in the Act.

CASTLEWOOD COUNTRY CLUB

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: **www.nlrb.gov**

1301 Clay Street, Federal Building, Room 300N
Oakland, California 94612-5211
Hours: 8:30 a.m. to 5 p.m.
510-637-3300.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 310-235-7351.